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2712

No. 13111

United States
Court of Appeals
For the Ninth Circuit.

IDALIA O. FRATT,

Appellant,

vs.

JOHN R. ROBINSON and JANE DOE ROBIN-
SON, Husband and Wife, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

NOV 14 1951

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In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2765

IDALIA O. FRATT, a Widow,

Plaintiff,

vs.

JOHN R. ROBINSON and JANE DOE ROBIN-
SON, Husband and Wife; TED R. ROBIN-
SON and JANE DOE ROBINSON, Husband
and Wife; LAURA R. McLEOD and JOHN
DOE McLEOD, Wife and Husband; J. S.
ROBINSON and JANE DOE ROBINSON,
Husband and Wife; and A. W. V. FORD
and JANE DOE FORD, Husband and Wife,
Individually and as Officers and Directors of
Robinson Plywood and Timber Company, a
Corporation; W. E. DIFFORD and JANE
DOE DIFFORD, Husband and Wife; and
SAMUEL P. McGHEI and JANE DOE Mc-
GHEI, Husband and Wife, Individually and
as Agents for the Aforementioned Defendants,
and as Agents for the Robinson Plywood and
Timber Company; and the ROBINSON PLY-
WOOD AND TIMBER COMPANY, a Cor-
poration (Formerly Known as the Robinson
Manufacturing Company),

Defendants.

COMPLAINT

Comes now plaintiff above named, and for cause of action against defendants above named, alleges as follows:

That at and during all times hereinafter mentioned, plaintiff was and now is the widow of Charles D. Fratt, residing in King County, State of Washington. That at and during all times hereinafter mentioned, John R. Robinson and Jane Doe Robinson, Ted R. Robinson and Jane Doe Robinson, Laura R. McLeod and John Doe McLeod, J. S. Robinson and Jane Doe Robinson, A. W. V. Ford and Jane Doe Ford, W. E. Difford and Jane Doe Difford, and Samuel P. McGhei and Jane Doe McGhei, respectively, formed marital communities under the laws of the State of Washington, residing in Snohomish or King County, Washington. That at and during all times hereinafter mentioned, said defendants acted for and on behalf of their respective marital communities. That at and during all times hereinafter mentioned, Robinson Plywood and Timber Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in Everett, Washington.

II.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00.

III.

That this action arises under the Securities Ex-

change Act of 1934, as amended, Public Law No. 291, 73 Congress N. R. 7263, 40 Stat. 681, U. S. C. Title 15, Section 78a, et seq., as hereinafter more fully set forth. That Section 10 of said Securities Exchange Act of 1934, inter alia, provides:

“It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national security exchange * * * (b) to use of employ, in connection with the purchase or sale of any security registered on a national securities exchange, or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules, and regulations as the Commission may prescribe as necessary or appropriate in the public interest, all for the protection of investors.”

This action arises further under Rule X-10B-5, promulgated by the Securities and Exchange Commission under the aforesaid Securities Exchange Act of 1934. Rule X-10B-5 provides:

“It shall be unlawful for any person directly or indirectly by the use of any means or instrumentality of interstate commerce, or of the mails, or of any “facility of any national securities exchange, (1) to employ any device, scheme or artifice to defraud, (2) to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

IV.

That the facts giving rise to the cause of action set forth in this Complaint were ascertained by plaintiff subsequent to January, 1949, and could not in the exercise of reasonable diligence been discovered by her prior thereto.

V.

That by the use of the mails, telephone, telegraph and other means and instruments of transportation in interstate commerce, the defendants, at the times hereinafter set forth:

(a) Employed a device, scheme or artifice to defraud the plaintiff;

(b) Made untrue statements of material facts;

(c) Omitted to state material facts necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; and

(d) Engaged in acts, practices or courses of conduct which operated as a fraud and deceit upon the plaintiff in connection with the purchase and sale of the securities of the Robinson Manufacturing Company (now the Robinson Plywood and Timber Company), as hereinafter set forth.

VI.

That prior to September, 1945, plaintiff was the holder and owner of 781.25 shares of the common capital stock of defendant corporation out of an authorized and issued common capital stock of 7,500 shares. That the said stock of defendant corporation owned by plaintiff was originally acquired by plaintiff and her deceased husband, Charles D. Fratt, as a marital community, about the year 1901. That plaintiff's husband had interest in the business of defendant corporation for many years, although plaintiff, as an elderly housewife, is inexperienced in business matters and that at no time personally participated in the business operations of defendant corporation.

VII.

That plaintiff is informed and therefore alleges that at all times herein referred to, defendants, John R. Robinson, Ted R. Robinson, Laura R. McLeod, J. S. Robinson and A. W. V. Ford have been the owners of 5,000 shares of common stock of the defendant corporation, the exact number of shares held by each being unknown to plaintiff. That at all times hereinafter referred to, the Board of Directors of defendant corporation was composed of John R. Robinson, Ted R. Robinson, Laura R. McLeod, J. S. Robinson and A. W. V. Ford, and that at all times hereinafter referred to, the executive officers of the defendant corporation were the following-named defendants in the following-named capacities:

John R. Robinson, President.

Laura R. McLeod, Vice-President.

Ted R. Robinson, Secretary and General Manager.

A. W. V. Ford, Treasurer.

That the defendants named in this paragraph are hereinafter referred to as the "Control Group."

VIII.

That the members of said Control Group have been in actual control of the company for many years, and have vested the actual management of the company for that period in its President, John R. Robinson, and themselves. That after the death of Charles D. Fratt, husband of the plaintiff, the plaintiff's only source of information concerning the business affairs of the defendant corporation, and the source upon which she relied, was through John R. Robinson, and the members of the Control Group. That because plaintiff's deceased husband for many years was an active participant in the business of defendant corporation and as a result of his close relationship and long personal association with said Control Group and particularly John R. Robinson, the plaintiff placed her complete trust and reliance in said John R. Robinson and the other members of the said Control Group. That John R. Robinson and the members of the Control Group occupied a fiduciary relationship to the plaintiff and other stockholders due to their positions as corporate officers, to the associations as aforementioned and under the provisions of the Securities Ex-

change Act and the regulations promulgated thereunder as aforesaid. The plaintiff had complete trust and confidence that John R. Robinson, the Control Group and the other defendants would care for and manage the said corporation within the limits and powers conferred by law and for the benefit of all the stockholders of said corporation, and further, that they were required to act in utmost good faith and were precluded from taking and receiving any personal advantage over any of the minority stockholders, including this plaintiff, and would make only complete and honest disclosures to them of the affairs of said corporation, and that the said John R. Robinson, the Control Group, and the other defendants were obligated to give the defendant corporation and the stockholders thereof the benefits of any advantages which they might obtain from their fiduciary positions and were precluded from over-reaching and making any private profit for themselves in the discharge of their official and fiduciary duties in connection with said corporation.

IX.

That at some time prior to September, 1945, the exact time of which is not known to plaintiff, the defendant members of the Control Group and defendant, Samuel P. McGhei, conceived and initiated a fraudulent scheme and conspiracy to defraud plaintiff with the ultimate object of securing for themselves all of the common capital stock of defendant corporation held by plaintiff and the other

minority stockholders. That thereafter, the exact time of which is not known to the plaintiff, defendant, W. E. Difford, joined with the Control Group in said fraudulent plan and conspiracy and thereafter took an active part, as hereinafter related, in the development and execution of the fraudulent plan. That the acquisition of plaintiff's stock as hereinafter related was the initial overt act in the execution of said fraudulent conspiracy. That said fraudulent conspiracy, by reason of the combined and concurring acts of the defendants, culminated in the acquisition by defendants of all of the outstanding common capital stock of plaintiff and other minority stockholders of defendant corporation at a price lower than and grossly disproportionate to the actual value of the minority stock so acquired.

X.

That, as more specifically hereinafter described, the initial overt act of the fraudulent plan and conspiracy was to acquire the 781.25 shares of stock owned by plaintiff for Fifty Thousand (\$50.000) Dollars, or Sixty-Four (\$64.00) Dollars per share. That thereafter between March 15, 1948, and November 17, 1948, defendant, W. E. Difford, on his own behalf and as agent for all the defendants, secured options, which were subsequently exercised, to purchase all the stock held by the other minority stockholders for \$320.00 per share. That all of the minority stockholders, excepting only plaintiff, heretofore brought an action in the United States District Court for the Eastern District of

Pennsylvania, being Cause No. 10322, against all of the defendants herein named, excepting only Samuel P. McGhei and Jane Doe McGhei, his wife, alleging the same fraudulent plan and conspiracy as herein set forth, and as a result of a compromise of said action, each and all of the other minority stockholders have been paid an additional \$110.00 per share for their stock in defendant corporation. That the total consideration per share realized by all other minority stockholders was \$430.00 per share, or 6.718 times more than the defendants paid to acquire the stock of plaintiff pursuant to the said fraudulent plan and conspiracy.

XI.

That on or about January 15, 1945, John R. Robinson, acting on his own behalf and as agent for the other defendants, pursuant to the fraudulent plan and conspiracy to defraud plaintiff knowingly and with the intent to deceive and defraud the said plaintiff, made the following fraudulent misrepresentations to the plaintiff:

(a) That the general financial condition of the company was insecure. In accordance with the fraudulent plan and conspiracy, he concealed the fact that the general financial condition of the company was good and its earning prospects excellent.

(b) That the company did not have and would be unable to acquire a reasonably sufficient supply of logs to enable it to maintain profitable operations at its location in Everett, Washington. In

accordance with the fraudulent plan and conspiracy, he concealed the fact that the company had long since abandoned its policy of securing timber from the open market and as a substitute therefor, had adopted a long-range policy of acquiring stock interest in corporations owning timber reserves, thus assuring an ample supply of logs and had either acquired or had entered into preliminary negotiations which would lead to the acquisition of these companies.

(c) That due to the lack of timber reserve and raw materials, the company intended to liquidate and/or move its plant from Everett, Washington, to a site in the State of Oregon, and such a change would be accomplished at a great financial loss to the defendant company. In accordance with the fraudulent plan and conspiracy, he concealed the fact that the company's present and long-range policy of securing interests in corporations holding timber rights did not contemplate a change in the location of the plant at Everett, Washington.

(d) That John R. Robinson and/or other members of the Control Group, knowing that the plaintiff and other minority stockholders did not have any representation on the Board of Directors of the company, nevertheless did not consult or advise the plaintiff and/or other minority stockholders of the company's long-range policy of acquiring timber reserves.

(e) That John R. Robinson and/or members of the Control Group failed to provide and deliberately avoided providing plaintiff with full and

complete information concerning the financial condition and financial prospects of the company.

(f) That John R. Robinson and/or members of the Control Group failed and refused to advise the plaintiff and/or other minority stockholders that the Control Group were dissatisfied with the company's sales outlets of jobbers and commissioned salesmen. That John R. Robinson and the Control Group concealed the fact that they and other "insiders" in the lumber industry knew that the termination of World War II would see a great rise of building and home construction which would occasion a demand for the company's particular products as never theretofore experienced. John R. Robinson and the members of the Control Group further concealed from plaintiff the fact that the Control Group, in conjunction with defendant, W. E. Difford, planned to organize a subsidiary company with interlocking directors, which company would have the exclusive sales rights of the products of the Robinson Manufacturing Company and thus exploit the anticipated demand for company's products and consequent increase in sales. John R. Robinson and other members of the Control Group, knowing that plaintiff did not have any representation on the Board of Directors of company, nevertheless did not consult or advise her that its formation would substantially increase the profits of defendant corporation.

(g) In accordance with the fraudulent plan and conspiracy, John R. Robinson and other members of the Control Group fraudulently concealed the

fact that the earnings of the company were such that dividends were warranted and contemplated. Plaintiff is informed and believes and therefore avers that a dividend was declared and paid shortly after the acquisition of her stock, and further that the declaration and payment of said dividend was withheld pending the acquisition of her stock in accordance with the fraudulent plan and conspiracy.

XII.

That John R. Robinson and the members of the Control Group knew that plaintiff would not have sold her stock at the grossly inadequate price of Sixty-Four (\$64.00) Dollars per share if she had been aware of the truth with respect of the fraudulent misrepresentations and concealments hereinbefore alleged. To conceal their personal acquisition of plaintiff's stock at a grossly inadequate price, John R. Robinson and the Control Group entered into a fraudulent plan and conspiracy with Samuel P. McGhei, whereby:

(a) Samuel P. McGhei, an employee of defendant company, would endeavor to secure an option to purchase the plaintiff's stock at the lowest possible price.

(b) McGhei, in securing the same, would advise plaintiff that he was acquiring the stock to improve his chances for personal advancement in the company; that he was acting solely for himself; that he was buying the stock with his own money, and that if it became necessary to obtain

funds to exercise the option from outside sources, he would obtain the same from his mother.

(c) McGhei would conceal the fact that he was acting as agent for John R. Robinson and/or the members of the Control Group.

(d) The Control Group would advance the One Thousand (\$1,000.00) Dollars "down" money to McGhei, and that thereafter the Control Group would advance the balance of the money necessary to exercise the option.

(e) McGhei would not invest any of his own capital, would not have any actual interest in the stock acquired by means of the fraudulent scheme, and that John R. Robinson and other members of the Control Group would advance all moneys necessary to effectuate the fraudulent plan and would divide the stock thereby acquired in ratio to the money advanced by each.

XIII.

That on or about the 10th day of September, 1945, Samuel P. McGhei, acting as agent for the other defendants and in pursuance of said fraudulent plan and conspiracy, made the following false and fraudulent misrepresentations to the plaintiff deliberately, wilfully and knowingly, and with the intent to deceive and defraud the plaintiff:

(a) That he, McGhei, held a minor position in the Robinson Manufacturing Company, and that he desired to purchase the stock of the plaintiff because its acquisition would improve his chances for advancement in the company. McGhei fraudu-

lently concealed the fact that he was purchasing the stock of plaintiff as agent for John R. Robinson and the other defendants of the Control Group.

(b) That McGhei offered Fifty Thousand (\$50,000.00) Dollars for the plaintiff's stock, suggesting that the sale be made via an option, calling for One Thousand (\$1,000.00) Dollars "down" money, the balance of Forty-Nine Thousand (\$49,000.00) Dollars to be paid upon exercise of the option. McGhei suggested that the plaintiff endorse her stock and place the same in escrow with his bank, pending that bank's receipt of McGhei's Forty-Nine Thousand (\$49,000.00) Dollars. McGhei fraudulently concealed that the offer was made pursuant to the fraudulent plan as aforementioned and that the option would be exercised by John R. Robinson and/or the Control Group.

(c) That he, McGhei, had One Thousand (\$1,000.00) Dollars of his own money; that he would pay plaintiff a total of Fifty Thousand (\$50,000.00) Dollars for plaintiff's 781.25 shares of stock; that he would raise the balance of Forty-Nine Thousand (\$49,000.00) Dollars. That, in fact, McGhei's mother never contemplated advancement of the money for the purchase of the stock; that it was never intended that McGhei would own any of the plaintiff's stock, but instead he was merely purchasing it for John R. Robinson and the Control Group.

XIV.

That a few days prior to the exercise of the option, McGhei, as agent for John R. Robinson

and the Control Group, contacted the plaintiff and recited that he and his mother had only Forty-Five Thousand (\$45,000.00) Dollars available for the exercise of the option and thereupon, requested plaintiff to reduce the total option consideration from Fifty Thousand (\$50,000.00) Dollars to Forty-Five Thousand (\$45,000.00) Dollars. Neither McGhei nor John R. Robinson, nor any other member of the Control Group, revealed that at this time neither McGhei nor his mother had raised or had agreed to raise Forty-Five Thousand (\$45,000.00) Dollars, and McGhei further concealed that this Forty-Five Thousand (\$45,000.00) Dollar figure was merely a trick to enable John R. Robinson and the other members of the Control Group to obtain the plaintiff's stock for a consideration of Forty-Five Thousand (\$45,000.00) Dollars, or a Five Thousand (\$5,000.00) Dollar reduction from the original option consideration. That nevertheless plaintiff refused to grant the requested reduction.

XV.

That thereafter and pursuant to the said fraudulent plan and conspiracy, defendant, John R. Robinson, on his own behalf and as agent for the Control Group, by the use of the United States Mails, authorized and directed the First National Bank of Everett, Washington, to write to the National Bank of Commerce, in Seattle, Washington, instructing the latter bank to deduct Forty-Nine Thousand (\$49,000.00) Dollars from the account of the former bank, and to transmit and/or credit

the same to the plaintiff's account, and further instructed said bank to forward the plaintiff's stock, then held by it in escrow pursuant to said option, to the First National Bank of Everett for delivery by it to John R. Robinson.

XVI.

That plaintiff is informed and believes and therefore avers that upon acquiring the stock of plaintiff as aforesaid, the members of the Control Group then divided the stock between themselves in accordance with their respective financial contributions to the fraudulent plan, scheme and conspiracy as aforementioned.

XVII.

That plaintiff gave the said option to McGhei and sold her stock upon the exercise thereof in reliance upon the misrepresentations and concealments as aforementioned, and as a result of said fraudulent misrepresentations and concealments of material facts, and that but therefor, plaintiff would not have given said option or sold her stock at the grossly inadequate price specified in said option nor for less than its true value. That by reason of said frauds and concealments, the defendant members of the Control Group violated their fiduciary duty to plaintiff as aforesaid.

XVIII.

That subsequent to the fraudulent acquisition of the plaintiff's stock as aforesaid, but in pursuit of the same fraudulent plan and conspiracy which

ultimately divested the minority stockholders of their stock in defendant corporation at a grossly inadequate price, said John R. Robinson, the Control Group, and the other defendant conspirators proceeded, in part, as follows:

(a) That Isabella V. Zimmerman, of Everett, Washington, an elderly widow whose husband had been connected with defendant corporation for many years, owned 312½ shares of stock in the defendant corporation. That John R. Robinson on behalf of all defendants, on his own initiative and without invitation from Zimmerman, went to her home and endeavored to induce Zimmerman to sell her stock to him by repeating the misrepresentations and concealments made to plaintiff, as more specifically set forth in Paragraph XI hereof. John R. Robinson made a further fraudulent misrepresentation to her that he had acquired the stock of plaintiff for the sum of Ten Thousand (\$10,000.00) Dollars, and fraudulently concealed the fact that he and the other members of the Control Group had fraudulently acquired the same for a consideration of Fifty Thousand (\$50,000.00) Dollars. John R. Robinson then offered Mrs. Zimmerman Ten Thousand (\$10,000.00) Dollars for her stock, which offer was refused.

(b) That, unable to acquire the Zimmerman stock by the fraudulent misrepresentations and concealments aforementioned, the defendant conspirators then used the same general plan which had been successful in defrauding the plaintiff, that is, Samuel P. McGhei went to the home of Mrs. Zimmerman, on his own initiative and uninvited, and

asked if her stock in defendant corporation were for sale and stated that he "would like to have first chance at it" when she decided to sell, and requested that she sell it to him instead of any of the members of the Control Group. In accordance with the fraudulent plan and conspiracy, McGhei concealed the fact that he was acting as agent for John R. Robinson and the members of the Control Group, and further concealed the fact that he had acted similarly in fraudulently acquiring the stock of the plaintiff. That later McGhei again went to the home of Mrs. Zimmerman and repeated his fraudulent misrepresentations and concealed from her the facts aforesaid.

(c) That late in March or early in April, 1948, defendant, W. E. Difford, acting in accordance with the fraudulent plan and conspiracy and as agent for John R. Robinson and the members of the Control Group, went to the home of Mrs. Zimmerman and fraudulently misrepresented to her that:

(1) John R. Robinson, Ted R. Robinson and Laura R. McLeod were selling out their interests in defendant corporation to a "big company in the East";

(2) He, W. E. Difford, was acting as agent for the "big company in the East" to consummate the transaction;

(3) He was getting options to buy all the outstanding stock of said corporation, and had already obtained options from John R. Robin-

son, Ted R. Robinson, Laura R. McLeod, A. W. V. Ford and J. S. Robinson;

(4) That John R. Robinson, Ted R. Robinson and Laura R. McLeod would sever their connection with said corporation;

(5) That on the same day, Mrs. Zimmerman called the offices of the defendant corporation and talked over the telephone to defendant, Ted R. Robinson, who, in response to her specific questions as to whether he was selling his stock and leaving the company, falsely replied that it was true and that he was selling out and that John R. Robinson was doing likewise. As a result of the afore-said misrepresentations and concealments, Mrs. Zimmerman gave Difford an option, subsequently exercised, to purchase her 312½ shares of stock for Three Hundred Twenty (\$320.00) Dollars per share, although her stock was then worth a much greater sum per share.

(d) That after March 1, 1948, by use of the United States Mails, telephone and other means and instrumentalities of interstate commerce, and in pursuance of the said fraudulent plan, scheme and conspiracy herein alleged, defendants, W. E. Difford and John R. Robinson, did contact the other minority stockholders of defendant corporation in the Eastern part of the United States and by the use of the same and similar false misrepresentations and concealments did secure options to purchase the stock of defendant corporation held

by them for Three Hundred Twenty (\$320.00) Dollars per share, which option was exercised in accordance with the conspiracy set forth. That these minority stockholders likewise relied on such misrepresentations and concealments in selling their stock for Three Hundred Twenty (\$320.00) Dollars per share, although their stock was then worth a much greater sum per share.

XIX.

That John R. Robinson and the other members of the Control Group, having acquired the stock of plaintiff and other minority shareholders, amended the Articles of Incorporation of the defendant company, changed the corporate name from "Robinson Manufacturing Company" to "Robinson Plywood and Timber Company" and, further, changed the authorized number of shares from seventy-five hundred (7,500) shares of common capital stock, having a par value of One Hundred Dollars per share, to one and a half million shares of common capital stock, having a par value of One Dollar per share, or an increase of sixty-six (66) for one (1). Thereafter they caused a Registration Statement to be filed with the Securities and Exchange Commission pursuant to the Securities and Exchange Act of 1933, wherein it was proposed to offer two hundred seventy-one thousand twenty-five (271,025) shares of said common capital stock of defendant company to the public. The plaintiff avers that of the aforesaid two hundred seventy-

one thousand twenty-five (271,025) shares to be offered to the public, at least two hundred sixteen thousand five hundred forty-six (216,546) shares represented stock of defendant company formerly owned by the plaintiff and other minority stockholders. The aforementioned Registration Statement was withdrawn immediately after all defendants, except Samuel P. McGhei, received notification of a contemplated lawsuit by minority shareholders other than the plaintiff herein.

XX.

Plaintiff avers that all representations made, acts or things said or done, and all concealments of necessary and material facts and information required to have been disclosed by any one or more of the individual defendants, were in furtherance of the fraudulent plan and scheme and conspiracy into which all of the defendants entered, and were made on behalf of all of the said defendants with intent to deceive and defraud plaintiff.

XXI.

Plaintiff alleges on information and belief that the true value of the stock sold by her to defendants in reliance upon the misrepresentations and concealments hereinbefore alleged at the time of the sale was Five Hundred (\$500.00) Dollars per share, and at the time of plaintiff's discovery of said fraudulent conspiracy, the true and actual value of said stock had increased to approximately One Thousand (\$1,000.00) Dollars per share, or a total

of \$781,250.00 for plaintiff's stock. That by reason thereof, plaintiff has been damaged in the sum of \$731,250.00.

XXII.

No demand is made upon the defendant corporation to bring this action or upon the officers and directors thereof as they are defendants herein.

XXIII.

Plaintiff hereby demands trial by jury of this action.

Wherefore, plaintiff prays for judgment against defendants, John R. Robinson, Ted R. Robinson, Laura R. McLeod, J. S. Robinson, A. W. V. Ford, W. E. Difford and Samuel P. McGhei, and against their respective marital communities, and against defendant corporation, Robinson Plywood and Timber Company (formerly known as the Robinson Manufacturing Company) in the sum of \$731,250.00, or such other sum as may be determined in this action, together with interest, and for plaintiff's costs and disbursements herein to be taxed. Plaintiff further prays for such other relief as to the Court may seem just, including exemplary damages.

SCARBOROUGH & HARRIS,
METZGER, BLAIR, GARDNER
& BOLDT,

/s/ GEO. H. BOLDT.

[Endorsed]: Filed April 19, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS UNDER RULE 12 (b)

Come now the defendants, John R. Robinson and Theta S. Robinson, his wife (impleaded herein as Jane Doe Robinson); Ted R. Robinson and Inez W. Robinson, his wife (impleaded herein as Jane Doe Robinson); J. S. Robinson and Carol Robinson, his wife (impleaded herein as Jane Doe Robinson; A. W. V. Ford and Myrtle Ford, his wife (impleaded herein as Jane Doe Ford), individually and as Officers and Directors of Robinson Plywood and Timber Company, a corporation; Samuel P. McGhie and Virginia McGhie, his wife (impleaded herein as Jane Doe McGhie), individually and as agents for the aforementioned defendants, and as agents for the Robinson Plywood and Timber Company; and Robinson Plywood and Timber Company, a corporation (formerly known as the Robinson Manufacturing Company), and move the Court as follows:

1. To dismiss the action under Rule 12 (b) (1) for lack of jurisdiction over the subject matter, it appearing upon the face of the Complaint that the action does not involve a controversy under the Constitution and laws of the United States, although purporting to do so:

(a) in that the transactions complained of did not involve a security traded in upon a securities exchange or upon an "over-the-counter" market and are, therefore, not within the purview of the Securities Exchange Act of

1934, which is set forth in the Complaint as the basis for jurisdiction; and

(b) in that the Securities Exchange Act of 1934 does not provide a civil right of action for the type of transactions alleged in the Complaint.

2. To dismiss the action under Rule 12 (b) (6) for failure of plaintiff to state a claim against any of said defendants upon which relief can be granted by this Court, on the ground that plaintiff has not brought herself or said cause of action within the purview of Section 10 of the Securities Exchange Act of 1934, and particularly in that she has not, pursuant to the requirements of said Section, alleged that the defendants, or any of them, have made use of any means or instrumentality of interstate commerce or of the mails or of any facility of any National Securities Exchange in connection with the use or employment of any manipulative or deceptive device in the acquisition of plaintiff's stock in contravention of said Section 10 or of any rules and regulations of the Securities and Exchange Commission adopted pursuant thereto.

Motion to Dismiss Under Rule 3

Said defendants further move the Court as follows:

1. To dismiss the action under Rule 3 for the reason that said action has not been commenced within the time limited by law.

Motion to Strike Under Rule 12 (f)

1. Said defendants further move to strike cer-

tain portions and paragraphs of plaintiff's Complaint under Rule 12 (f) as follows:

(a) to strike those portions of paragraph IX of plaintiff's Complaint relating to the alleged acquisition by defendants of Stock of Robinson Plywood and Timber Company (formerly Robinson Manufacturing Company) other than the Stock acquired from plaintiff, for the reason and upon the ground that said allegations are irrelevant and immaterial and have no valid relation to plaintiff's cause of action.

(b) to strike all of paragraph X of plaintiff's Complaint, with the exception of the first sentence thereof, for the reason and upon the ground that the matters therein set forth are not relevant or material to plaintiff's alleged cause of action, and relate to acts and events happening subsequent to the acquisition of plaintiff's Stock. Defendants particularly move to strike the last thirteen (13) lines of paragraph X on page 7 of plaintiff's Complaint reading as follows:

“That all of the minority stockholders, excepting only plaintiff, heretofore brought an action in the United States District Court for the Eastern District of Pennsylvania, being Cause No. 10322, against all of the defendants herein named, excepting only Samuel P. McGhie and Jane Doe McGhie, his wife, alleging the same fraudulent plan and conspiracy as herein set forth, and as a result of a compromise of said action, each and all of the other minority stockholders have been paid an addi-

tional \$110.00 per share for their stock in defendant corporation. That the total consideration per share realized by all other minority stockholders was \$430.00 per share, or 6.718 times more than the defendants paid to acquire the stock of plaintiff pursuant to the said fraudulent plan and conspiracy.”

for the reason that the matters therein set forth are not relevant or material to plaintiff’s alleged cause of action, and involve the compromise and settlement of a law suit between other persons not parties to this action, and are irrelevant, immaterial and incompetent.

(c) Defendants move the Court for an Order striking all of paragraphs XVIII and XIX, and each of said paragraphs, of plaintiff’s Complaint, for the reason and upon the ground that each and every of the allegations contained in said paragraphs, and each of them, are irrelevant and immaterial to plaintiff’s cause of action and relate solely to alleged overt acts, doings and representations of the defendants made and done subsequent to the acquisition of plaintiff’s stock.

O. D. ANDERSON, and

J. P. HUNTER,

By /s/ O. D. ANDERSON,

Attorneys for Moving
Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed May 10, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS UNDER RULE 12 (b)

Defendant W. E. Difford moves the court as follows:

1. To dismiss the action under Rule 12 (b) (1) for lack of jurisdiction over the subject matter, it appearing upon the face of the complaint that the action does not involve a controversy under the Constitution and laws of the United States, although purporting to do so:

(a) in that the transactions complained of did not involve a security traded in upon a securities exchange or upon an "over-the-counter" market and are therefore not within the purview of the Securities Exchange Act of 1934, which is set forth in the complaint as the basis for jurisdiction; and

(b) in that the Securities Exchange Act of 1934 does not provide a civil right of action for the type of transactions alleged in the complaint.

2. To dismiss the action under Rule 12 (b) (6) for failure of the plaintiff to state a claim against defendant, W. E. Difford, upon which relief can be granted by the court.

3. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted, in that it appears on the face of the complaint that the right of action set forth

did not accrue within two (2) years next before the commencement of this action.

Motion to Strike Under Rule 12 (f)

Defendant, W. E. Difford, moves the court as follows:

To strike from the plaintiff's complaint the following allegations on the ground that they are immaterial to the issues herein.

1. In the 7th and 8th lines of Paragraph 9 the words "and the other minority stockholders."

2. The sentence in the 12th, 13th, 14th and 15th lines of said Paragraph 9 reading as follows: "That the acquisition of plaintiff's stock as hereinafter related was the initial overt act in the execution of said fraudulent conspiracy."

3. In the 18th and 19th lines of said Paragraph 9 the words reading "and other minority stockholders of defendant corporation."

4. In the 20th line of said Paragraph 9 the word "minority."

5. All of Paragraph 10.

6. All of Paragraph 18.

7. All of Paragraph 19.

Due to the complexity of the issues raised by this motion, the defendant is not now serving and filing with this motion "a brief written statement of reasons in support of the motion and a list of citations

of the authorities on which he relies'' under Rule 9 (b) of Local Rules of Civil Procedure of the United States District Court for the Western District of Washington, but will serve and file a brief in support of this motion prior to the hearing on this motion.

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,

/s/ M. A. MARQUIS,

Attorneys for Defendant,
W. E. Difford.

Service of the foregoing motion admitted at Tacoma, Washington, this 11th day of May, 1951.

METZGER, BLAIR, GARDNER
& BOLDT,

GEO. H. BOLDT,

By /s/ B. L. E.,

Of Counsel for Plaintiff.

[Endorsed]: Filed May 12, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS UNDER RULE 12 (b)

Defendants Laura R. McLeod and Loren McLeod, her husband, move the Court as follows:

1. To dismiss the action under Rule 12 (b) (1) for lack of jurisdiction over the subject matter, it appearing upon the face of the Complaint that the action does not involve a controversy under the Constitution and laws of the United States, although purporting to do so:

(a) in that the transactions complained of did not involve a security traded in upon a securities exchange or upon an "over-the-counter" market and are therefore not within the purview of the Securities Exchange Act of 1934, which is set forth in the complaint as the basis for jurisdiction; and

(b) in that the Securities Exchange Act of 1934 does not provide a civil right of action for the type of transactions alleged in the complaint.

2. To dismiss the action under Rule 12 (b) (1) for lack of jurisdiction over the subject matter in that it does not sufficiently appear in the complaint that acts and conduct complained of by Plaintiff involved the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national security exchange to bring the action within the purview of the Securities Exchange Act of 1934 set forth in the complaint as the basis for jurisdiction.

3. To dismiss the action under Rule 12 (b) (6) for failure of the Plaintiff to state a claim against Defendants, Laura R. McLeod and Loren McLeod, her husband, upon which relief can be granted by the Court in that it fails to sufficiently allege these Defendants' participation in or control over the acts and conduct complained of.

4. To dismiss the action because the complaint fails to state a claim against these Defendants upon which relief can be granted in that it appears on the face of the complaint that the action was not commenced in the time limited by law.

Motion for More Definite Statement
Under Rule 12 (e)

Defendants Laura R. McLeod and Loren McLeod, her husband, move the Court as follows:

To move that the Plaintiff's Complaint and the statements made thereunder be made more definite.

1. As to Paragraph IV of the complaint, to set forth the date when Plaintiff ascertained the facts giving rise to the alleged cause of action and to set forth facts establishing her inability to discern the perpetration of the alleged fraud.

2. As to Paragraph XVI of the complaint, to set forth the amount of the Plaintiff's stock which these Defendants received as a result of the division therein referred to.

3. As to Paragraph XVII of the complaint, to set forth what amount in dollars is meant by the words "true value" in line 8 thereof.

Motion to Strike Under Rule 12 (f)

Defendants Laura R. McLeod and Loren McLeod, her husband, move the Court as follows:

To strike from the Plaintiff's Complaint the following on the grounds that they are immaterial to the issues herein, and are redundant:

1. Paragraph V of the complaint.
2. Paragraph VII, line 11, page 5, to the end of the paragraph.
3. All reference to "other minority stockholders" in paragraphs IX, XI.
4. The third sentence of paragraph IX.
5. Paragraph X.
6. From paragraph XI, subparagraphs (d), (e), (f), and (g), the statements "and/or members of the Control Group" and "and other members of the Control Group."
7. Paragraph XVIII.
8. Paragraph XIX.
9. From the word "and" in line 5 of paragraph XXI to the end of paragraph.
10. Paragraph XXII.
11. From the prayer of the complaint, the words "including exemplary damages."

Due to the complexity of the issues raised by this Motion, the Defendants are not now serving and filing with this Motion "a brief written statement

of reasons in support of the motion and a list of citations of the authorities on which they rely” under Rule 9 (b) of Local Rules of Civil Procedure of the United States District Court for the Western District of Washington, but will serve and file a brief in support of this motion prior to the hearing on this motion.

TORBENSON & BAUM,

/s/ RICHARD M. THATCHER,

/s/ RAYMOND D. TORBENSON,

Attorneys for Defendants, Laura R. McLeod and
Loren McLeod, Her Husband.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 9, 1951.

[Title of District Court and Cause.]

MOTION OF SECURITIES AND EXCHANGE
COMMISSION FOR LEAVE TO PARTICI-
PATE AS AMICUS CURIAE AND NOTICE
OF HEARING THEREON

The Securities and Exchange Commission hereby moves this Honorable Court for leave to participate as amicus curiae in the above-entitled matter with respect to questions of law concerning the proper construction of Rule X-10B-5, 17 C.F.R. § 240.10b-5, promulgated by the Commission pursuant to Section 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

Defendants' motions to dismiss the complaint, which is based on that rule, raises the following questions of statutory construction:

(1) Does Section 10 (b) and Rule X-10B-5 apply to all securities transactions involving the use of the mails or instrumentalities of interstate commerce, or, as defendants contend, is the section and rule inapplicable to a transaction in a security not traded upon an exchange or in the over-the-counter markets maintained by professional securities brokers and dealers?

(2) Does a violation of Rule X-10B-5 entitle a person who has been injured thereby to maintain a civil action for private recovery?

(3) Are the uses of the mails which defendants allegedly made, or caused to be made, in connection with their purchase of plaintiff's securities, particularly mailings to effect payment for the securities and to obtain delivery of them, sufficient to provide jurisdiction under Rule X-10B-5?

(4) What statute of limitations is applicable to a private action seeking damages for violation of Rule X-10B-5?

The foregoing questions are discussed in the attached brief in which the Commission's views are set forth.

The Commission has participated in many private lawsuits as *amicus curiae*. Its purpose in so participating is to assist courts in the interpretation of the federal securities statutes which are primarily

administered by the Commission. In a number of cases Commission participation resulted from court invitation and in all other cases of this type the courts have granted the Commission's motion for permission to participate.

The Commission, accordingly, respectfully requests that it be permitted to participate as amicus curiae in this action, and to file the attached brief and any additional briefs which may hereinafter be required for the above-stated purpose. In the event that the instant motion is granted, the Commission will file such additional copies of the attached brief as may be required by the Court.

Notice is hereby given that this motion shall come on for hearing before the above-entitled Court at the Federal Courthouse in Seattle, Washington, at 10:00 o'clock a.m. on July 2, 1951, or as soon thereafter as the matter may be heard by the Court.

Dated June 26, 1951.

Respectfully submitted,

/s/ ROGER S. FOSTER,

General Counsel.

/s/ ALEXANDER COHEN,

Special Counsel, Securities

and Exchange Commission.

/s/ JAMES E. NEWTON,

Attorney.

/s/ DONALD J. STOCKING,

Attorney, Securities and

Exchange Commission.

[Endorsed]: Filed June 26, 1951.

[Title of District Court and Cause.]

ORDER ON MOTIONS TO STRIKE, MOTIONS
TO MAKE MORE DEFINITE AND CER-
TAIN, AND MOTIONS TO DISMISS

This matter coming on for hearing in Open Court before the undersigned Judge thereof on the 31st day of July, 1951, upon the several motions of defendants to strike, make more definite and certain, and to dismiss, plaintiff appearing by and through her attorneys, Mr. Arthur Harris of the law firm of Scarborough and Harris of Philadelphia, Pennsylvania, and Mr. George H. Boldt of the law firm of Metzger, Blair, Gardner & Boldt of Tacoma, Washington; defendants Laura R. McLeod and John Doe McLeod, wife and husband, appearing by their attorney, Mr. Richard M. Thatcher of the law firm of Torbenson & Baum of Seattle, Washington; defendants W. E. Difford appearing by his attorney, Mr. M. A. Marquis of the law firm of McMicken, Rupp & Schweppe; and all other defendants appearing by and through their attorneys, Mr. O. D. Anderson and Mr. J. P. Hunter of Everett, Washington; the Securities Exchange Commission, amicus curiae, appearing by and through its attorney, Mr. Donald J. Stocking; and the several motions of defendants having been heard and argument having been had thereon, and the Court having examined the files and records herein, and the respective briefs and memorandums of authorities of the parties hereto, and being otherwise fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the several motions of all the defendants to strike certain portions and paragraphs of plaintiff's complaint under Rule 12 (f) of the Rules of Civil Procedure, which portions and paragraphs are hereinbelow set forth, to wit:

(a) All of Paragraph X of plaintiff's complaint, with the exception of the first sentence thereof, and

(b) All of Paragraphs XVIII and XIX, and each of said paragraphs of plaintiff's complaint,

upon the grounds and for the reasons that the allegations hereinabove described constituted pleadings of evidentiary matters is hereby granted, and said portions and paragraphs of plaintiff's complaint hereinabove set forth are hereby stricken, with the express reservation that such ruling be in no manner or respect whatever construed as a ruling on the admissibility of any evidence that may be offered at the trial relating to the subject matter of the allegations stricken, it being the intent of this ruling to leave decision upon the admissibility of all evidence, including that which may be offered relating to the subject matter of the allegations now stricken, to the judgment and decision of the court passing upon the pre-trial order or the court presiding at the trial of the cause, and

That a general allegation of conspiracy on the part of each and all of the defendants with respect of their acquisition of the minority stock of de-

fendant corporation, without particularity as to the details thereof, may be included in the complaint, and because of the position of defendants taken with relation thereto, shall not be subject to any motion to make more definite, to strike, or to dismiss, and

The plaintiff having conceded in her brief and in oral argument before the Court that the motion of the defendants, Laura R. McLeod and John Doe McLeod, her husband, to strike from the word “and” in line five (5) of Paragraph XXI to the end of the paragraph, and all of Paragraph XXII of the complaint, and from the prayer of the complaint the words “including exemplary damages” is hereby granted and said allegations herein referred to are stricken from the complaint, and

It Is Further Ordered, Adjudged and Decreed that all other motions to strike made on behalf of any or all of the defendants are denied, and

It Is Further Ordered, Adjudged and Decreed that all of the foregoing rulings may be complied with by plaintiff by interlineation and/or substitution of pages, and

It Is Further Ordered, Adjudged and Decreed that the several motions of all the defendants to dismiss the action under Rule 12 (b) (1) of the Rules of Civil Procedure for lack of jurisdiction over the subject matter, it appearing on the face of the complaint that there is no diversity of citizenship between the parties and that the action does not involve a controversy under the Constitution and laws of the United States, be and the same is

hereby granted upon the sole ground that the transactions complained of do not involve a security traded in or upon a securities exchange or upon an "over-the-counter" market and are therefore not within the purview of the Securities Exchange Act of 1934 which is set forth in the complaint as the basis of jurisdiction, and plaintiff's complaint and the cause or causes of action alleged therein are hereby dismissed with costs, and

It Is Further Ordered, Adjudged and Decreed that the several motions of all the defendants to dismiss under Rule 12 (b) (1) of the Rules of Civil Procedure on the ground that the Securities Exchange Act of 1934 does not provide a civil right of action for the type of action alleged in plaintiff's complaint is denied, and

It Is Further Ordered, Adjudged and Decreed that the several motions of all the defendants to dismiss under Rule 3 of the Rules of Civil Procedure on the ground that said action has not been commenced within the time limited by law is hereby denied.

Done in Open Court This 16th day of August, 1951.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

Presented in Open Court and in the presence of all counsels concerned:

By /s/ GEO. H. BOLDT,
Of Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court and to each and all of the above-named defendants and their respective attorneys of record herein:

Notice Is Hereby Given that Idalia O. Fratt, a widow, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the below-quoted portion of the order and judgment of the Court made and entered in this action on August 6, 1951:

“It Is Further Ordered, Adjudged and Decreed that the several motions of all the defendants to dismiss the action under Rule 12 (b) (1) of the Rules of Civil Procedure for lack of jurisdiction over the subject matter, it appearing on the face of the complaint that there is no diversity of citizenship between the parties and that the action does not involve a controversy under the Constitution and laws of the United States, be and the same is hereby granted upon the sole ground that the transac-

tions complained of do not involve a security traded in or upon a securities exchange or upon an 'over-the-counter' market and are therefore not within the purview of the Securities Exchange Act of 1934 which is set forth in the complaint as the basis of jurisdiction, and plaintiff's complaint and the cause or causes of action alleged therein are hereby dismissed with costs, * * *

SCARBOROUGH & HARRIS,
METZGER, BLAIR, GARDNER
& BOLDT,

/s/ GEO. H. BOLDT,
Attorneys for Plaintiff.

[Endorsed]: Filed August 28, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (c) of the Federal Rules of Civil Procedure, I am transmitting herewith all of

the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause, and that said papers constitute the record on appeal from the judgment and order dated August 6th, 1951, to the United States Court of Appeals for the Ninth Circuit, and are identified as follows:

1. Complaint, filed Apr. 19, 1951.
2. Summons with Marshal's Returns thereon, filed Apr. 26, 1951.
3. Appearance of Raymond D. Torbenson and Richard M. Thatcher for defendants Laura R. McLeod, et ux., filed May 10, 1951.
4. Motion to Dismiss under Rule 12 (b) of defendants John R. Robinson, et al., filed May 10, 1951.
5. Motion to Dismiss under Rule 12 (b) of defendant W. E. Difford, filed May 12, 1951.
6. Motion to Dismiss under Rule 12 (b) of defendant Laura R. McLeod, et vir., filed Jun. 9, 1951.
7. Notices of hearing on Motions to Dismiss, filed Jun. 18, 1951.
8. Brief of Defendant W. E. Difford in Support of Motion to Dismiss and Motion to Strike, filed Jun. 26, 1951.
9. Motion of Securities and Exchange Commission for Leave to Participate as Amicus Curiae and Notice of Hearing Thereon, filed Jun. 26, 1951.
10. Brief for the Securities and Exchange Commission, Amicus Curiae, sur Motions to Dismiss Complaint, filed Jun. 26, 1951.

11. Brief of Defendants Laura McLeod, et vir., in Support of Their Motion to Dismiss Under Rule 12 (b); Their Motion for More Definite Statement, and Their Motion to Strike Under Rule 12 (f), filed Jun. 27, 1951.

12. Acknowledgment of Service of Brief of Defendant Difford by Metzger, Blair, Gardner & Boldt, filed Jun. 27, 1951.

13. Brief of Defendants John R. Robinson, et al., in Support of Their Motion to Dismiss, and Motion to Strike, filed Jul. 2, 1951.

14. Plaintiff's Memorandum of Authorities on Defendants' Motions to Dismiss, Strike and Make More Definite, filed Jul. 26, 1951.

15. Order granting motion of Securities and Exchange Commission to participate amicus curiae in the cause, filed Jul. 31, 1951.

16. Order on Motions to Strike, Motions to Make More Definite and Certain, and Motions to Dismiss, filed Aug. 6, 1951, by Judge McLaughlin.

17. Notice of Appeal of Plaintiff, filed Aug. 28, 1951.

18. Bond for Costs on Appeal (\$250.00), by Gen. Cas. Co. of America, filed Aug. 28, 1951.

19. Designation of Contents of Record on Appeal, filed Aug. 31, 1951.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of plaintiff, to wit:

Filing fee, notice of appeal, \$5.00; and that said amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 21st day of September, 1951.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13111. United States Court of Appeals for the Ninth Circuit. Idalia O. Fratt, Appellant, vs. John R. Robinson and Jane Doe Robinson, Husband and Wife, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed September 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13111

IDALIA O. FRATT, a Widow,

Appellant,

vs.

JOHN R. ROBINSON and JANE DOE ROBINSON, Husband and Wife; TED R. ROBINSON and JANE DOE ROBINSON, Husband and Wife; LAURA R. McLEOD and JOHN DOE McLEOD, Wife and Husband; J. S. ROBINSON and JANE DOE ROBINSON, Husband and Wife; and A. W. V. FORD and JANE DOE FORD, Husband and Wife, Individually and as Officers and Directors of Robinson Plywood and Timber Company, a Corporation; W. E. DIFFORD and JANE DOE DIFFORD, Husband and Wife; and SAMUEL P. McGHEI and JANE DOE McGHEI, Husband and Wife, Individually and as Agents for the Aforementioned Defendants, and as Agents for the Robinson Plywood and Timber Company; and the ROBINSON PLYWOOD AND TIMBER COMPANY, a Corporation (Formerly Known as the Robinson Manufacturing Company),

Respondents.

STATEMENT OF POINTS ON WHICH
APPELLANT WILL RELY ON THE APPEAL

The portion of the order and judgment of the

District Court appealed from, dismissed plaintiff's action on the ground that the security transactions complained of in the complaint were not within the purview of the Securities Exchange Act of 1934. In this appeal, appellant will contend that under the allegations of the complaint the transactions complained of were within the purview of Section 10 (b) of the Securities Exchange Act of 1934, and that accordingly, the District Court had jurisdiction to entertain the action.

SCARBOROUGH & HARRIS,
METZGER, BLAIR, GARDNER
& BOLDT,

/s/ GEO. H. BOLDT,
Attorneys for Appellant.

[Endorsed]: Filed September 28, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above-entitled court and to each
and all of the above-named defendants and
their respective attorneys of record herein:

Appellant above named hereby designates the following portions of the record and proceedings as necessary for consideration of the points on which appellant will rely on the appeal:

1. The Complaint.
2. The several motions of defendants.
3. The order and judgment of the Court made and entered herein on August 6, 1951.
4. The Notice of Appeal.
5. Certificate of Clerk.

Dated this 27th day of September, 1951.

SCARBOROUGH & HARRIS,
METZGER, BLAIR, GARDNER
& BOLDT,

/s/ GEO. H. BOLDT,
Attorneys for Appellant.

[Endorsed]: Filed September 28, 1951.

No. 13111

IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

IDALIA O. FRATT,

Appellant,

vs.

JOHN R. ROBINSON and

JANE DOE ROBINSON,

Husband and wife, et al.,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN. DIVISION

OPENING BRIEF OF APPELLANT

SCARBOROUGH & HARRIS,
METZGER, BLAIR, GARDNER & BOLDT,
ARTHUR R. HARRIS,
GEORGE H. BOLDT,

Attorneys for Appellant.

Office and Post Office Address:
523 Tacoma Building, Tacoma 2,
Pierce County, Washington.

FILED

DEC 10 1951

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PAUL P. O'BRIEN
CLERK

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

IDALIA O. FRATT, a widow,

Appellant,

vs.

JOHN R. ROBINSON and JANE DOE ROBINSON,
husband and wife; TED R. ROBINSON and
JANE DOE ROBINSON, husband and wife;
LAURA R. MCLEOD and JOHN DOE
MCLEOD, wife and husband; J. S. ROBIN-
SON, and JANE DOE ROBINSON, husband
and wife; and A. W. V. FORD and JANE
DOE FORD, husband and wife, individually
and as Officers and Directors of Robinson
Plywood and Timber Company, a corpora-
tion; W. E. DIFFORD and JANE DOE DIFFORD,
husband and wife; and SAMUEL P. MCGHEI
and JANE DOE MCGHEI, husband and wife,
individually and as agents for the afore-
mentioned defendants, and as agents for the
Robinson Plywood and Timber Company;
and the ROBINSON PLYWOOD & TIMBER
COMPANY, a corporation (formerly known
as the Robinson Manufacturing Company,

Respondents.

INTRODUCTION

As set forth in Appellant's Statement of Points,
this is an appeal from an order and judgment of dis-
missal of plaintiff-appellant's action upon the ground
that the security transactions set forth in the complaint

were not within the purview of the Securities Exchange Act of 1934 (R. 47). Three other grounds urged for dismissal but overruled by the trial court will be presented in this brief. These are:

(a) That the action was not commenced within the time limited by law.

(b) That the Securities Exchange Act of 1934 does not provide a civil right of action for the type of claim alleged in plaintiff's complaint.

(c) That the allegations of use of means and instrumentalities of interstate commerce and of the mails are insufficient.

JURISDICTIONAL STATEMENT

This action arose under the Securities Exchange Act of 1934, as amended, Public Law No. 291, 73 Congress N. R. 7263, 40 Stat. 681, U.S.C.A. Title 15, Section 78a, *et seq.* Section 10 of said Act, Title 15, U.S.C.A. Section 78j, provides:

“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) to use or employ, in connection with the purchase or sale of any security registered on a

national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”

This action arose further under Rule X-10B-5, promulgated by the Securities and Exchange Commission under said Section. Rule X-10B-5, 17 C.F.R. Section 240.10b-5, provides:

“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange. (1) to employ any device, scheme or artifice to defraud, (2) to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

Respondents’ motions to dismiss Appellant’s complaint under Rule 12(b)(1) and Rule 3 of the Rules of Civil Procedure were sustained in part as follows:

“It Is Further Ordered, Adjudged and Decreed that the several motions of all the defendants to dismiss the action under Rule 12(b)(1) of the Rules of Civil Procedure for lack of jurisdiction over the

subject matter, it appearing on the face of the complaint that there is no diversity of citizenship between the parties and that the action does not involve a controversy under the Constitution and laws of the United States, be and the same is hereby granted upon the sole ground that the transactions complained of do not involve a security traded in or upon a securities exchange or upon an 'over-the-counter' market and are therefore not within the purview of the Securities Exchange Act of 1934 which is set forth in the complaint as the basis of jurisdiction, and plaintiff's complaint and the cause or causes of action alleged therein are hereby dismissed with costs, and

"It Is Further Ordered, Adjudged and Decreed that the several motions of all the defendants to dismiss under Rule 12(b)(1) of the Rules of Civil Procedure on the ground that the Securities Exchange Act of 1934 does not provide a civil right of action for the type of action alleged in plaintiff's complaint is denied, and

"It Is Further Ordered, Adjudged and Decreed that the several motions of all the defendants to dismiss under Rule 3 of the Rules of Civil Procedure on the ground that said action has not been commenced within the time limited by law is hereby denied." (R. 40, 41).

Jurisdiction of the United States District Court was based upon Title 28, U.S.C.A., Section 1331 and Title 15, U.S.C.A., Section 78aa, and it is alleged that the amount in controversy exceeds \$3,000.00, exclusive of interest and costs (R. 4, 5).

Jurisdiction of this appeal is conferred upon the United States Court of Appeals for the Ninth Circuit by reason of Title 28, U.S.C.A., Section 1291.

STATEMENT OF THE CASE

This case was dismissed upon motions directed to the complaint under Rule 12(b)(1) and Rule 3 of the Rules of Civil Procedure (R. 25-35, 38-41). This being an action for fraud and deceit, the facts are alleged in the complaint with particularity. The substance thereof is as follows:

Prior to September, 1945, plaintiff owned 781.25 shares of common stock in defendant corporation out of an authorized and issued capital stock of 7,500 shares. Plaintiff was an elderly housewife, inexperienced in business affairs, although the community of she and her deceased husband had acquired their stock originally about the year 1901 and her deceased husband had been active in the company until his death (R. 7).

The individual defendants, other than defendants McGhie and Difford, owned 5,000 shares of such stock, and were the directors and officers of the defendant corporation, and are hereinafter referred to as the "Control Group" (R. 7-8). It is alleged that for many years the Control Group have been in actual management

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and control of the affairs of the corporation, and that they occupy a fiduciary relationship to plaintiff (R. 8-9).

At some time prior to September, 1945, the members of the Control Group and defendant, Samuel P. McGhie, conceived and initiated a fraudulent scheme and conspiracy to defraud plaintiff and other minority stockholders of their stock, and that defendant, W. E. Difford, joined this conspiracy at a subsequent time and took an active part (R. 9, 10).

On or about January 15, 1945, defendant, John R. Robinson, acting for and on behalf of all the defendant conspirators, falsely and fraudulently misrepresented to plaintiff the financial condition of the company; its log supply; concealed its actual timber policy; represented that the company intended to liquidate or move to Oregon; deliberately avoided providing plaintiff with full financial information on the company; concealed the plans of the Control Group and Difford to organize a sales company with interlocking directorate to exploit anticipated demand; and further concealed the fact that earnings were good and dividends warranted. Said dividends were paid shortly after her stock was fraudulently acquired by the Control Group (R. 11, 12, 13, 14).

The Control Group knew plaintiff would not sell her stock for the \$64.00 per share which she received

for it if she had known the truth about such misrepresentations and concealments. The Control Group entered into a conspiracy with defendant, Samuel P. McGhie, who, acting as undisclosed agent for the Control Group, made the following false and fraudulent misrepresentations to plaintiff deliberately, wilfully and knowingly with intent to deceive and defraud her:

“(a) That he, McGhie, held a minor position in the Robinson Manufacturing Company, and that he desired to purchase the stock of the plaintiff because its acquisition would improve his chances for advancement in the company. McGhie fraudulently concealed the fact that he was purchasing the stock of plaintiff as agent for John R. Robinson and the other defendants of the Control Group.

“(b) That McGhie offered Fifty Thousand (\$50,000.00) Dollars for the plaintiff's stock, suggesting that the sale be made via an option, calling for One Thousand (\$1,000.00) Dollars 'down' money, the balance of Forty-Nine Thousand (\$49,000.00) Dollars to be paid upon exercise of the option. McGhie suggested that the plaintiff endorse her stock and place the same in escrow with his bank, pending that bank's receipt of McGhie's Forty-Nine Thousand (\$49,000.00) Dollars. McGhie fraudulently concealed that the offer was made pursuant to the fraudulent plan as aforementioned and that the option would be exercised by John R. Robinson and/or the Control Group.

“(c) That he, McGhie, had One Thousand (\$1,000.00) Dollars of his own money; that he would pay plaintiff a total of Fifty Thousand

(\$50,000.00) Dollars for plaintiff's 781.25 shares of stock; that he would raise the balance of Forty-Nine Thousand (\$49,000.00) Dollars. That, in fact, McGhei's mother never contemplated advancement of the money for the purchase of the stock; that it was never intended that McGhei would own any of the plaintiff's stock, but instead he was merely purchasing it for John R. Robinson and the Control Group." (R. 14, 15, 16).

Paragraphs V, XV and XVIII(d) of the complaint set forth the allegations of use of the means and instrumentalities of interstate commerce and of the mails. Paragraph XV is as follows:

"That thereafter and pursuant to the said fraudulent plan and conspiracy, defendant, John R. Robinson, on his own behalf and as agent for the Control Group, by the use of the United States Mails, authorized and directed the First National Bank of Everett, Washington, to write to the National Bank of Commerce, in Seattle, Washington, instructing the latter bank to deduct Forty-Nine Thousand (\$49,000.00) Dollars from the account of the former bank, and to transmit and/or credit the same to the plaintiff's account, and further instructed said bank to forward the plaintiff's stock, then held by it in escrow pursuant to said option, to the First National Bank of Everett for delivery by it to John R. Robinson." (R. 17-18).

Plaintiff is informed and believes that her stock was divided between the members of the Control Group. She would not have sold her stock for less than its true

value except for such misrepresentations and concealments (R. 18).

It is further averred that plaintiff's stock was worth \$500.00 per share at the time she sold it to said conspirators, and at the time she was first able to discover the fraud by reasonable diligence in January of 1949, it was worth \$1,000.00 per share. That plaintiff has been damaged in the sum of \$340,625.00, that being the difference between the amount paid plaintiff and the market value at the time of the sale. (R. 6, 23, 40).

ASSIGNMENTS OF ERROR

1. The Trial Court erred in granting dismissal of plaintiff's complaint and in entering judgment dismissing the cause of action upon the ground that the transactions complained of did not involve a security traded in or upon an "over-the-counter" market and are therefore not within the purview of the Securities Exchange Act of 1934, which is the only basis for jurisdiction alleged in the complaint.

2. The Trial Court erred in holding that private sales of corporate stock are not within the purview of and subject to Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. Section 78j(b) and Rule X-10B-5 of the Securities Exchange Commission, 17 C.F.R. Section 240.10b-5

ARGUMENT

I. Section 10(b) of the Securities Exchange Act of 1934, and Rule X-10B-5 thereunder, apply to fraudulent conduct in all security transactions involving the use of the mails or instrumentalities of interstate commerce. Their application is not limited to securities traded upon an exchange or traded by brokers or dealers.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. Section 78j(b) provides:

“It shall be unlawful for *any person*, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange *or any security not so registered*, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” (Emphasis supplied).

Rule X-10B-5 promulgated by the Commission thereunder, 17 C.F.R. Section 240.10b-5, provides:

“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumen-

tality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

- (1) to employ any device, scheme, or artifice to defraud,
- (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of *any security*.” (Emphasis supplied.)

The basic issue in this case is whether Section 10(b) and Rule X-10B-5 apply to fraudulent conduct in “private” or “doorstep” transactions in securities, or whether their application is limited to fraudulent conduct in security transactions traded on an exchange or by a broker or dealer.

Defendants assert that the quoted fraud sections apply only to transactions in a security, if that security is traded on a national securities exchange, or is traded by a licensed broker or dealer.

Plaintiff’s contention is that Section 10(b) and Rule X-10B-5 apply to fraudulent conduct in all security

transactions involving the use of the mails or instrumentalities of interstate commerce. Further, plaintiff contends that an "over-the-counter" transaction is simply one that does not utilize the facilities of a securities exchange, and includes any sale or any purchase of a security, whether or not traded on a national securities exchange or handled by a broker or dealer.

Every adjudicated case, except only the instant one, has sustained plaintiff's contentions as to the application of the fraud provisions referred to. Likewise, wherever application of the phrase "over-the-counter market" has been claimed, the Courts either denied the relevancy or confirmed plaintiff's construction thereof.

Defendants' briefs in the trial court made extended references to irrelevant excerpts from the legislative history of the securities Acts and to out-of-context quotations from speeches or books written by various officials of the Securities and Exchange Commission. This procedure was initiated in *Robinson v. Difford*, 92 Fed. Supp. 145 (1950)—where the Defendants, with one exception, were identical to those in the instant case. Defendants' District Court brief in the present case was substantially a word for word duplication of the brief filed in *Robinson v. Difford*. The Securities and Exchange Commission's brief in that case anticipated this "argument" and the excerpts and quotations

of Defendants were analyzed and stripped of significance. The trial court, in a well considered opinion, denied all of the Defendants' Motions to Dismiss. In both the present and the Difford cases, Defendants cited the following excerpt from a speech delivered in 1944 by Edward H. Cashion, then counsel to the Securities and Exchange Commission, as establishing that Section 10(b) and Rule X-10B-5 *did not apply* to fraudulent conduct in a "private" security transaction:

"The Securities and Exchange Act of 1934 and its subsequent amendments were designed to regulate trading in securities—the purchase and sale of securities—on national securities exchanges and in over-the-counter markets, and to regulate brokers and dealers. The act and its amendments were designed to strengthen the fraud prevention and disclosure provisions of the prior act." (Cashion, address entitled "*Fraud on the Seller of Securities*," published in Proceedings of Twenty-Seventh Annual Convention of National Association of Securities Commissioners (1944).

Defendants failed to set forth the paragraph which immediately followed the quoted excerpt. The omitted portion is as follows:

"One step in that direction was the promulgation of a Rule by the Commission, now known as Rule X-15C1-2, adopted pursuant to Section 15(c) of the 1934 Act. That Rule prohibits fraud by brokers and dealers in either the sale or purchase

of securities. *Another loophole, however, was still to be closed in the protections administered by the Commission.*" (Emphasis ours.)

"The step to close that loophole was taken in May 1942 when the Commission, acting pursuant to Sections 10(b) and 23(a) of the Act, adopted Rule X-10B-5. This Rule embodies the broad anti-fraud provisions of Section 17(a) of the 1933 Act, and specifically prohibits fraud by *any person* in connection with the *purchase or sale* of securities." (*Ibid.* Emphasis that of Mr. Cashion.)

It is noted that Mr. Cashion stated that Rule X-15C1-2 prohibits fraudulent conduct by *brokers and dealers* in either the sale or purchase of securities. He then relates that the Securities and Exchange Commission, cognizant that a vast number of persons were still unprotected from fraudulent conduct in connection with a purchase or sale of securities, "... adopted Rule X-10B-5." Further, to fully inform the Court, Defendants should have quoted the following from Mr. Cashion's speech:

"... the Securities Act of 1933, was designed to bring about adequate disclosure of the nature of securities to be offered for sale to the public and to prevent fraud in their distribution or sale. *Although certain securities and certain security transactions are exempted from the registration provisions of that Act, there are no EXEMPTIONS FROM its anti-fraud section, Section 17(a).*" (*Ibid.* Emphasis ours.)

In this regard the Court's attention is directed to Section 17(a)—the general anti-fraud provision of the Securities Act of 1933, Title 15, U.S.C.A., Section 77q. Section 17(a), however, covers only fraud in the sale of a security, whereas, Section 10(b) of the 1934 Act is broader for it applies to fraud in the purchase as well as in the sale of a security. In *Rosenberg v. Globe Aircraft Corp.*, 80 Fed. Supp. 123 (Ed. Pa. 1948), the Court, speaking of the '33 and '34 Acts, stated that "the two Acts are unquestionably in *pari materia* and must be construed to make a consistent whole," and the Court should look "at them as one statute." The anti-fraud provisions of Section 17(a) have been held applicable to "private" sales of securities not traded on an exchange nor handled by a securities broker or dealer. *S. E. C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943); *U. S. v. Earnhardt*, 153 F.(2d) 472 (C. A. 7, 1946), *cert. denied*, 328 U. S. 858 (1946); *U. S. v. Carruthers*, 152 F.(2d) 512 (C. A. 7, 1945), *cert. denied*, 327 U. S. 787 (1946); *Bowen v. U. S.*, 153 F.(2d) 747 (C. A. 8, 1946), *cert. denied*, 328 U. S. 835 (1946); *U. S. v. Monjar*, 147 F.(2d) 916 (C. A. 3, 1943), *cert. denied*, 325 U. S. 859 (1945).

The authorities confirm plaintiff's definition of "over-the-counter markets." All decided cases reject Defendants' contention as to Section 10(b) and Rule

X-10B-5, as well as their definition of an “over-the-counter market.”

In *Speed, et al. v. Trans-America Corp.*, 99 Fed. Supp. 808 (D. C. Delaware, 1951) wherein the Defendants raised the identical propositions here advanced, the court said at page 830:

“Defendant misreads the scope of the Act when it contends that the stock purchases do not fall within the purview of the statute, and that Rule X-10B-5 cannot validly be applied to those purchases, because the Act does not attempt to regulate securities transactions not effected on an organized exchange or in the ‘over-the-counter market’. Section 10(b) makes it unlawful for ‘any person’ by the use of any means or instrumentality of interstate commerce or of the mails, to employ a fraudulent device in contravention of Rule X-10B-5 in the purchase of ‘any security registered on a national securities exchange or any security not so registered’ . . . An ‘over-the-counter’ transaction is simply one which does not utilize the facilities of a securities exchange, but under the unambiguous provisions of the Act, it covers the sale or purchase of a security on a doorstep, as well as the trading of a professional securities broker. It would appear that over-the-counter transactions, as such, are not specifically regulated by the Act, but they are dealt with through provisions directed at the trading activity of ‘any person’ in ‘any security’. In short, *Congress did not intend to limit application of the Act to transactions on exchanges and in the organized over-the-counter markets maintained by brokers and dealers.*” (Footnote: See

H. R. Rep. No. 2307, 75 Cong., 3d Sess. (1938) p. 2: "*Under the Securities Exchange Act of 1934, the over-the-counter markets are deemed to include all transactions in securities which take place otherwise than upon a National Securities Exchange. These markets are immense, the activities embraced therein are varied, and they are of the utmost importance to the national economy.*") (Emphasis ours.)

Wallace R. Fulton, Executive Director of the National Association of Securities Dealers, Inc., in *Fundamentals of Investment Banking*, Sec. 8, p. 42 (Investment Bankers Association of America, 1947) said:

"First of all, what is meant by the over-the-counter market? *Briefly, this market embraces all transactions in securities not made on stock exchanges.*"

See also the definition of "over-the-counter market" in Munn, *Encyclopedia of Banking and Finance*, (1937) p. 545, as "The market for securities not listed on any regularly organized exchange."

As previously mentioned, the Defendants and the material facts in the instant case are practically identical to those in *Robinson v. Difford*, 92 Fed Supp. 145. The securities transaction involved in each case was a "private" one, as the stock was never traded on a national exchange or handled by a broker or dealer. In the Difford case the Defendants interposed the same

Motion to Dismiss on the ground that Section 10(b) and Rule X-10B-5 only covered fraudulent conduct in securities traded on a national exchange or handled by a broker or dealer. The briefs of the Defendants in that case were substantially identical to those submitted in the instant case, and the trial court heard extensive oral argument thereon. In rejecting all of the contentions of the Defendants in the Difford case the Court stated that Section 10(b) and Rule X-10B-5 applied to fraudulent conduct in security transactions not registered on an exchange as well as those which were registered, and held it entirely irrelevant whether or not the securities involved were ever traded in what the Defendants characterize as “over-the-counter market.”

The Defendants’ version of Mr. Cashion’s speech, as hereinbefore discussed, together with other irrelevant excerpts from legislative history were considered—and rejected—by the trial court for the obvious reason that Section 10(b) and Rule X-10B-5 are so clear and unambiguous that it is not necessary to consider the preamble or “legislative history.” The pertinent parts of the opinion are as follows:

“Plaintiffs have expressly and solely grounded their action on Section 10(b) of the Securities Exchange Act of 1934 and rule X-10B-5 promulgated thereunder by the Securities Exchange Commission.

“The defendants have filed a motion to dismiss the complaint under rule 12(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Their contentions can be summarized as follows:

1. The court lacks jurisdiction of the subject matter because, contrary to the requirements of the Securities Exchange Act, the transactions complained of did not involve securities traded on a securities exchange or in the over-the-counter market.

2. The court lacks jurisdiction of the subject matter because the Securities Exchange Act does not provide a civil right of action for the type of transaction described in the complaint. (p. 147).

* * * * *

“Defendants’ first argument for the dismissal of the complaint is that the Securities Exchange Act does not apply where, as in the present case, the securities in question were neither registered on a national exchange nor traded in the over-the-counter market. *Clearly this argument is without foundation.*” (p. 147, Emphasis ours).

* * * * *

“The Act applies both to securities registered on a national securities exchange and to ‘any security not so registered’. Rule X-10B-5 clearly makes the acts set forth in the complaint unlawful. Consequently, the Act applies to the present case even though the securities involved were not registered on a securities exchange and were never traded in the over-the-counter market. This is so

clear from the language of section 10(b) itself that no other proper interpretation is possible. However, defendants vigorously contend that the limited purpose of the Act was to regulate only transactions in securities registered on a national exchange or traded in the over-the-counter market, and not to regulate private transactions. In support of this contention they point to the preamble statement (section 2, 15 U.S.C.A. and 78b) of the general purpose of the Act and to statements made by members of Congress when the Act was under consideration therein. Without deciding that these statements do show such a limited purpose as is contended by defendants, this court must reject defendants' contention, because section 10(b) itself, under which the present action was brought, is unambiguous. Reliance on the preamble statement of section 2 in order to alter the plain and unambiguous provisions of section 10(b) would violate a basic canon of statutory construction that statements in a preamble may be referred to only for the purpose of clarifying an ambiguity in a statutory provision. Likewise, the legislative history of an act may not properly be considered in construing an unambiguous statutory provision such as section 10(b). There are no other sections of the Act which indicate that Congress intended to limit the application of the Act to transactions involving either registered securities or unregistered securities traded in the over-the-counter market. (p. 148).

“(6) Defendants also contend that the Act does not create a civil right of action in people who may have been injured by a violation thereof. This argument, however, has been rejected by a number of decisions, including decisions of this court:

Kardon v. National Gypsum Co., D.C.E.D. Pa. 1946, 69 F. Supp. 512; *Fry v. Schumaker*, D.C.E.D. Pa. 1947, 83 F. Supp. 476; *Rosenberg v. Globe Aircraft Corp.*, D.C.E.D. Pa. 1948, 80 F. Supp. 123; *Hall v. American Cane & Pretzel Co.*, D.C.E.D. Pa. 1947, 71 F. Supp. 266." (p. 149).

The factual situation in *Kardon v. National Gypsum*, 69 Fed. Supp. 512, is substantially identical to that of the instant case. There were but four shareholders in the Defendant company, the stock had never been traded on a national exchange, nor had it ever been handled by a securities broker or dealer in what the Defendants characterize as an "over-the-counter" transaction. The brief of the Defendant Slavins in the *Kardon* case argued the present Defendants' definition of "over-the-counter market":

"Only four persons, the two plaintiffs and the two defendants are involved in the purchase and sale of the securities in question. i.e. the common stock of the two Michigan corporations, *which was never listed on any Exchange, nor traded in the Over-the-Counter market.* Between them, the four owned all of the outstanding capital stock of the two corporations. There is no outside interest in any of the securities of the two Michigan corporations; there is, therefore, no public interest involved. There is no room for any public interest, since the two Kardons and the two Slavins hold all of the outstanding stock to the exclusion of the public. Nor are there any investors whose interest requires protection. *The plaintiffs cannot claim to*

belong to the investing public insofar as these two corporations are concerned." (Emphasis ours.)

The trial court, in denying the Motion to Dismiss, said at page 514:

"... the whole statute discloses a broad purpose to regulate securities transactions of all kinds, and as part of such regulation the specific section in question provides for the elimination of all manipulation or deceptive methods in such transactions . . . I cannot agree . . . that investors (as used in Section 10(b)) is limited to persons who are about to invest in a security or that two men who have acquired ownership of the stock of a corporation are not investors merely because they own one-half of the total issue."

In a second Kardon opinion, 73 Fed. Supp. 798, the court again renounced the contention of the Defendants:

"The acts of the defendants specified in the complaint constituted a violation of the Act. *Section 10(b)* makes it unlawful to use any deceptive device, in contravention of the Commission's rules, in connection with the purchase of *any security registered or unregistered*. *Rule X-10B-5* specifically makes it unlawful to 'employ any device * * * to defraud * * * to omit to state a material fact necessary to make the statements made * * * not misleading or to engage in any act, practice or course of business which * * * would operate as a fraud or deceit * * *.' Under any reasonably liberal construction these provisions apply to direc-

tors and officers who, in purchasing the stock of the corporation from others, fail to disclose a fact coming to their knowledge by reason of their position, which would materially affect the judgment of the other party to the transaction.” (page 800, Emphasis supplied).

In *Grand Lodge of International Association of Machinists v. Highfield, et al.*, D.D.C. Civ. No. 3661-48, Jan. 24, 1949 (no opinion), the defendant officers and directors were charged with fraud in a purchase of stock that was not registered on a national exchange or traded by a broker or dealer. The Defendants’ Motion to Dismiss stated, *inter alia*:

“ . . . the defendants are not, and were not brokers, dealers in securities . . . furthermore, it is not alleged that the stock purchased by these defendants was listed on an exchange or traded in over-the-counter. The fact is, it was not so listed, and so far as these defendants are aware, was not traded in an ‘over-the-counter market’ . . . ”

Slavin, et al. v. Germantown Fire Insurance Co., 174 F.(2d) 799 (C.A. 3, 1949), likewise supports the contention of the plaintiff that Rule X-10B-5 applies to fraudulent conduct in “private” security transactions. The stock in question was not traded on an exchange nor effected through a securities broker or dealer. Violation of Rule X-10B-5 was charged. The Court of Appeals directed a dismissal of the action only because

it felt that Rosenlund's conduct at the "last minute" was such that it removed the aroma of fraud from his activities. It is abundantly clear that the Circuit Court of Appeals would have held that Rule X-10B-5 applied to this "private" transaction if Rosenlund's otherwise fraudulent activities had not been cleansed by his last minute disclosures.

The cited decisions clearly establish that the application of Section 10(b) and Rule X-10B-5 is not limited to security transactions on a national exchange or which are traded by a broker or dealer. Further, the phrase "over-the-counter market" is a blanket term covering all security transactions not conducted through the medium of a national exchange.

Every contention concerning applicability of the Securities Exchange Act of 1934 urged by defendants in the instant case was raised, exhaustively considered, and decided adversely to defendants' contentions in *Speed, et al. v. Trans-America Corporation*, 99 Fed. Supp. 808 (D. C. Delaware, 1951). The facts of the case are lengthy and complex, and will not be reviewed in detail here. A violation of Rule X-10B-5 was alleged in the purchase of securities from minority stockholders. No brokers or dealers were used to complete the transaction, and the securities were not listed or traded on any national exchange. The Defendants denied the

applicability of Rule X-10B-5 on the grounds that the securities were not listed on a national exchange nor purchased through a broker-dealer. The Defendants, as in the instant case, cited Section 2 of the preamble to the Securities Exchange Act of 1934, with the contention that the transactions were not subject to Section 10(b) and Rule X-10B-5, since they had not been accomplished through a dealer or broker, and hence, were not in the "over-the-counter market," as contemplated by the aforementioned preamble.

In rejecting each and every argument advanced by the Defendants in the instant case the court stated at pages 828 to 831:

"In my view, the facts show a violation by defendant of Rule X-10B-5, promulgated by the S.E.C. under Section 10(b) of the Securities Exchange Act of 1934. The rule is clear. It is unlawful for an insider, such as a majority stockholder, to purchase the stock of minority stockholders without disclosing material facts affecting the value of the stock, known to the majority stockholder by virtue of his inside position but not known to the selling minority stockholders, which information would have affected the judgment of the sellers. The duty of disclosure stems from the necessity of preventing a corporate insider from utilizing his position to take unfair advantage of the uninformed minority stockholders. It is an attempt to provide some degree of equalization of bargaining position in order that the minority may exercise an informed judgment in any such transaction. Some courts have

called this a fiduciary duty while others state it is a duty imposed by the 'special circumstances'. One of the primary purposes of the Securities Exchange Act of 1934 was to outlaw the use of inside information by corporate officers and principal stockholders for their own financial advantage to the detriment of uninformed public security holders. I gave approval to this view of the Act in an earlier opinion in the case at bar when I denied Transamerica's motion for summary judgment.

"Moreover, I reject Transamerica's four contentions with respect to counts 2, 3 and 4 in that 1. it had no duty to disclose under Rule X-10B-5 its inside information; 2. that if the Rule requires such disclosure, it violates the Fifth Amendment to the Constitution of the United States; 3. that the Rule was not authorized by 10(b) of the Act if construed to apply to securities transactions such as those here involved because they were not effected on a stock exchange or through the media of professional broker-dealers, or to a stock purchase not involving any express misrepresentations; and 4. both Section 10(b) and Rule X-10B-5 violate the Fifth Amendment and are invalid as unconstitutional delegations of legislative powers.

"Defendant's contention that only express misrepresentations or half-truths are unlawful fails to look at the fact that an implied misrepresentation is just as fraudulent as an express one and constitutes an untrue statement of a material fact within the meaning of the governing Rule. *Charles Hughes & Co., Inc. v. S.E.C.*, 2 Cir., 139 F.(2d) 434, cert. den., 321 U. S. 786; *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 at 800; *Hughes v. S.E.C.*, D.C., 174 F.(2d) 969. Defendant's liability

for nondisclosure is not based primarily upon the provision of subparagraph 2 — subparagraph 1 of the Rule makes it unlawful 'To employ any device, scheme or artifice to defraud' and subparagraph 3 outlaws 'any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person * * *'. The three subparagraphs of this broadly remedial rule are mutually supporting and not mutually exclusive as defendant contends. Defendant's breach of its duty of disclosure accordingly can be viewed as a violation of all three subparagraphs of the Rule, i. e., (1) a device, scheme, or artifice to defraud; (2) an implied misrepresentation or misleading omission; and (3) an act, practice or course of business which operates or would operate as a fraud upon the Plaintiffs.

* * * * *

"Defendant misreads the scope of the Act when it contends that the stock purchases do not fall within the purview of the statute and that Rule X-10B-5 cannot validly be applied to those purchases, because the Act does not attempt to regulate securities transactions not effected on an organized exchange or in the 'over-the-counter'. Section 10(b) makes it unlawful for 'any person' by use of any means or instrumentality of interstate commerce or of the mails to employ a fraudulent device in contravention of Rule X-10B-5 in the purchase of 'any security not so registered.' The terms 'person,' 'broker,' and 'dealer', are separately defined by subparagraph (9), (4) and (5) of Section 3(a), respectively, 15 U.S.C.A. Section 78C(a) (9), (4), (5). *These are unambiguous provisions. An over-the-counter transaction is simply one which does not utilize the facilities of a securities exchange, but under the unambiguous provisions of*

the Act it covers the sale or purchase of a security on a doorstep as well as the trading of a professional securities broker. It would appear that over-the-counter transactions, as such, are not specifically regulated by the Act, but they are dealt with through provisions directed at the trading activity of 'any person' in 'any security.' In short, Congress did not intend to limit application of the Act to transactions on exchanges and in the organized over-the-counter markets maintained by brokers and dealers. It is also shown by the broad definition of the term 'security' in Section 3(a) (10) of the Act, as construed by the courts. *S.E.C. v. W J. Howey Co.*, 328 U. S. 293; *S.E.C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344; *Kardon v. National Gypsum Co.*, E. D. Pa., 69 F. Supp. 512; *Slavin v. Germantown Fire Insurance Co.*, E. D. Pa., 74 F. Supp. 876, *affd.*, 3 Cir., 174 F.(2d) 799; *Speed v. Transamerica*, D. C. Del., 71 F. Supp. 457. Judge Grim has been the first to consider specifically the question whether Section 10(b) and Rule X-10B-5 apply to transactions in securities not traded on an exchange or in the over-the-counter market. He concluded that the applicability of the rule 'is so clear from the language of Section 10(b) itself that no other interpretation is possible.' See *Robinson, et al., v. Difford, et. al.*, E. D. Pa., 92 F. Supp. 145.

"Under the 'deceptive device or contrivance' clause of Section 10(b) of the Securities Exchange Act of 1934, the S.E.C. is authorized to adopt the anti-fraud provisions of Rule X-10B-5 which are applicable to a stock purchase such as made by Transamerica in the case at bar. All through its lengthy argument on this point, defendant improperly assumes that the word 'deceptive' must be

limited to market manipulations. Market manipulation is but one specific type of deceit. To limit the term 'deceptive' to that type of deceit would run counter to the principle language of Section 10(b). In none of the cases cited, immediately above, was there any element of market manipulation. The acts were based solely on a fraudulent sale or purchase of securities."

II. A Private Civil Action May Be Maintained for Violation of Rule X-10B-5.

The trial court decided this point in favor of appellant.

This subject was so fully presented in the trial brief of the *Amicus Curiae*, the Securities and Exchange Commission, that we feel unable to improve thereon and therefore adopt same as follows:

Defendants' motions to dismiss are also based on the contention "that the Securities Exchange Act of 1934 does not provide a civil right of action for the type of transactions alleged in the complaint" (R. 26, 32). This defense was also rejected in the *Robinson v. Difford* case. Defendants' argument is that since no private action is expressly provided by the 1934 Act for a violation of a rule under Section 10(b), a violation of Rule X-10B-5 can only give rise to action by the government, and cannot afford a private person, who has

been injured by the violation, the right to maintain an action for damages or other relief. The right to maintain a private action for violation of Rule X-10B-5 has been unanimously upheld by many courts. In the *Robinson v. Difford* case, the defendants conceded that the cases were all against them, including cases decided in the same district. They contended, however, that there were no federal appellate court decisions on the question, and stated that they were raising the question to preserve their rights on appeal. They offered no further argument in the matter.

Slavin v. Germantown Fire Ins. Co., 174 F.(2d) 799 (1949), had been decided by the Court of Appeals for the Third Circuit at the time of the *Robinson v. Difford* case. The defendants in the *Slavin* case did not dispute the right of private action. They denied, however, that the Rule had been violated. A majority of the court, agreeing that no fraud had been proved, took occasion to state that "Logic and such authority as is available, seem to favor such (private) action" (174 F.(2d), at 805). The instant defendants argued, however, that this statement was merely dictum. There was also the earlier case of *Baird v. Franklin*, 141 F.(2d) 238 (1944), *cert. denied*, 323 U.S. 737 (1944), in which the Court of Appeals for the Second Circuit agreed that a private action could be maintained for violation of Section 6(b) of the 1934 Act, for which there is similarly

no express provision authorizing a private action. Plaintiffs lost the *Baird* case only because they had failed to sustain the burden of proving their damages. Subsequent to the *Robinson v. Difford* decision, the Court of Appeals for the Second Circuit expressly upheld the right to maintain a private action for violation of Rule X-10B-5. *Fischman v. Raytheon Mfg. Co., et al.*, C.C.H. Fed. Sec. L. Rep., Sec. 90,505 (decided April 23, 1951).

In addition to the foregoing appellate cases and the *Robinson v. Difford* case, we set forth below the many cases to date in which the right to maintain a private action for violation of Rule X-10B-5 has been upheld or recognized:

Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D.Pa., 1946) (leading case discussing rationale of private action for violation of Rule X-10B-5);

Speed v. Transamerica Corp., 71 F. Supp. 457 (D. Del., 1947);

Osborne v. Mallory, 86 F. Supp. 869 (S.D. N.Y., 1949);

Hawkins v. Merrill Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104 (W.D. Ark., 1949);

Fry v. Schumaker, 83 F. Supp. 477 (E.D. Pa., 1947);

Seward v. Hammond, 8 F.R.D. 457 (D. Mass., 1948);

Stella v. Kaiser, 82 F. Supp. 301 (S.D. N.Y., 1948);

Birnbaum v. Newport Steel Corp., C.C.H. Fed. Sec. L. Rep. Sec. 90,506 (S.D. N.Y., 1951);

Rosenberg v. Globe Aircraft Corp., 80 F. Supp. 123 (E.D. Pa., 1948);

Acker v. Schulte, 74 F. Supp. 683 (S.D. N.Y., 1947);

Montague v. Electronic Corp. of America, 76 F. Supp. 933 (S.D. N.Y., 1948);

Hall v. American Cone & Pretzel Co., 71 F. Supp. 266 (E.D. Pa., 1947);

Fifth-Third Union Trust Co. v. Block, S.D. Ohio, Civ. Action 1507, Dec. 11, 1946 (opinion in form of short letter to counsel stating that *Kardon* ruling is being followed);

McManus v. Jessup & Moore Paper Co., E.D. Pa., Civ. Action No. 8015, July 30, 1948 (no opinion);

Grand Lodge of International Association of Machinists v. Highfield, D.D.C., Civ. No. 3661-48, Jan. 24, 1949 (no opinion).

Because of these many decisions we do not propose to argue the question at length. For the information of the Court, however, we observe that

the implied right of private action under Rule X-10B-5 has been predicated primarily upon the basic tort doctrine that a person whose interest has been invaded as the result of another's violation of a statute intended in whole or in part for the protection of that interest is entitled to obtain private relief for such invasion. See *Restatement of Torts*, Sec. 286. There is, in addition, Section 29(b) of the 1934 Act, 15 U.S.C.A. Sec. 77cc(b), which provides that any contract made in violation of the Act shall be void as respects the rights of the violator. (An amendment to Section 29(b) in 1938, 52 Stat. 1076, providing *inter alia*, a short statute of limitations with respect to actions for violation of Commission rules under Section 15(c)(1) of the 1934 Act, 15 U.S.C.A. Sec. 780(c)(1), which, like Section 10(b) does not specifically provide for a private action, gives additional support for the right to maintain such action: for, by implication, the amendment suggests that Congress always assumed the availability of private actions under Section 15(c)(1) and similar provisions such as Section 10(b).) Whereas Section 29(b) only authorizes recovery based on the voiding of the contract, the first mentioned doctrine provides in addition the basis for recovery of tort damages. For a comprehensive discussion of the question, see the *Kardon* opinion, *supra*, and a student article, *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 Yale L. J. 1120, 1133 *et seq.* (1950).

Not only has no court ever denied the right of private action for violation of Rule X-10B-5, but, on the contrary, the underlying rationale has been applied to permit private lawsuits for violations of other provisions of the federal securities laws which similarly contain no express authorization for such actions. See, e.g., *Remar v. Clayton Securities Corp. et al.*, 81 F. Supp. 1014 (D. Mass. 1949); *Appel v. Levine*, 85 F. Supp. 240 (S.D. N.Y., 1948), and *O'Connell et al. v. Mallory et al.*, C.C.H. Fed. Sec. L. Rep. Sec. 90,445 (S.D. N.Y., 1949) (Regulations T and U under Section 7 of Securities Exchange Act of 1934); *Osborne et al. v. Mallory et al.*, 86 F. Supp. 869 (S.D. N.Y., 1949) (Section 17(a) of the 1933 Act; Section 15(c)(1) of the 1934 Act and Rule X-15C1-2 thereunder); *Hawkins v. Merrill Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104 (W.D. Ark., 1949) (Sections 11(d) and 17 (a) of the 1934 Act, and Rule X-17A-5 thereunder); *Fischman v. Raytheon Mfg. Co. et al.*, C.C.H. Fed. Sec. L. Rep. Sec. 90,505 (C.A. 2, 1951) (Section 17(a) of the 1933 Act, dictum). *Speed v. Transamerica Corp.*, 99 Fed. Supp. 808 (D.C. Delaware, 1951).

III. Defendants' Use of Instrumentalities of Interstate Commerce and of the Mails to Effect Payment for, and to Obtain Delivery of, Plaintiff's Securities are Sufficient Under Rule X-10B-5.

The trial court decided this point in favor of appellant.

On this subject also we adopt the brief of *Amicus Curiae* in the Trial Court as follows:

The motion to dismiss filed by defendants other than Difford is based also on plaintiff's asserted failure to allege any uses of the mails, instrumentalities of interstate commerce, or facilities of any national securities exchange in connection with the fraud practiced upon plaintiff. It appears, however, that in Paragraph V the complaint does allege, albeit in general terms, that "the mails, telephone, telegraph and other means and instruments of transportation in interstate commerce" were used in connection with the asserted fraud (R. 6). In Paragraph XV there is also a specific allegation that defendant John R. Robinson, on his own behalf and acting for the other defendants participating in the scheme at that time, used the mails to cause the First National Bank of Everett to instruct the National Bank of Commerce in Seattle, Washing-

ton, to transfer a credit of \$49,000 to plaintiff's account in the latter bank in payment for her stock, and to forward her shares, theretofore held in escrow pursuant to an option agreement, to the Everett bank for delivery to Robinson (R. 17). Subsequently, in Paragraph XVIII(d), plaintiff alleges further uses of the mails and instrumentalities of interstate commerce in connection with the later purchases from other minority stockholders (R. 21).

Whether or not Paragraph V, had it stood alone, would have been objectionable because of its generality (See in this connection, *S.E.C. v. Timetrust, Inc.*, 28 F. Supp. 34 (N.D. Calif., 1938)) is an academic question in this case because Paragraphs XV and XVIII(d) do allege specific uses of the mails. The relevancy and sufficiency of the allegations of Paragraph XVIII(d) involve mixed questions of fact and law relating to the nature and scope of the scheme to defraud. The allegations of Paragraph XV, we believe, are clearly sufficient; for they specifically charge that the defendants caused the mails to be used to effect payment of the purchase price and to obtain delivery of plaintiff's shares.

Defendants' motion did not specify why they regard the last-mentioned uses of the mails as insufficient; and we shall not speculate as to the possible basis of their contention. Suffice it to observe that under Rule

X-10B-5, as well as under Section 17(a) of the 1933 Act upon which the Rule is patterned, jurisdiction exists if the defendants use the mails, or cause others to use them, at any point in the furtherance of defendants' fraud. *Slavin v. Germantown Fire Insurance Co.*, 174 F.(2d) 799 (C.A. 3, 1949); *U. S. v. Monjar*, 147 F.(2d) 916 (C.A. 3, 1943), *cert. denied*, 325 U.S. 859 (1945); *Kopald-Quinn v. U. S.*, 101 F.(2d) 628 (C.A. 5, 1939), *cert. denied*, 307 U. S. 628 (1949); *Landay v. U. S.*, 108 F.(2d) 698 (C.A. 6, 1939); *S.E.C. v. Timetrust, Inc.*, 28 F. Supp. 34 (N.D. Calif. 1939). Such uses include, of course, mailings pertaining to payment for the security, or to the delivery of the security pursuant to the sale agreement. *Mansfield v. U. S.*, 155 F.(2d) 952 (C. A. 5, 1946), *cert. denied*, 329 U. S. 792 (1946); *U. S. v. Earnhardt*, 153 F.(2d) 472 (C.A. 7, 1946), *cert. denied*, 328 U. S. 858 (1946); *Bogy v. U. S.*, 96 F.(2d) 734 (C.A. 6, 1938), *cert denied*, 305 U. S. 608 (1938); *S.E.C. v. Wimer*, 75 F. Supp. 955 (W. D. Pa., 1948); *U. S. v. Vidaver*, 73 F. Supp. 382 (E.D. Va., 1947). The underlying rationale is that the basic purpose of the anti-fraud provisions of the federal securities laws is to outlaw fraudulent securities transactions wherever possible within the scope of Congressional power, and that the requirements relating to the use of the mails or facilities of interstate commerce were intended only to provide the necessary

jurisdictional props to support this Congressional program. Accordingly, the jurisdictional clauses are given broad scope. Plaintiff's allegations fall well within the foregoing rationale and decisions, and are sufficient.

IV. The Action Was Timely Commenced.

The trial court decided this point in favor of appellant.

This action was within the plain and direct language of the Washington statute, Rem. Rev. Stat. 159(4), which provides as follows:

“Within three years:

4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;”

The Washington Supreme Court repeatedly has held that it is the “gist,” “substance” and “gravamen” of an action—not its procedural form—that is determinative of the section of the statute of limitations applicable thereto. *McDonald v. Camas Prairie R. Co.*, 180 Wash. 555, 557, 38 Pac. (2d) 515, 516; *Rundin v. Sells*, 1 Wn.(2d) 332, 95 Pac.(2d) 1023.

“To determine whether an action is one upon contract or in tort, attention will be given to the

substance of the action rather than to the form and the nature of the right the violation of which creates the right of action." *McDonald v. Camas Prairie R. Co.*, *supra*, in which decision, all of the above quoted words are used.

Actionable fraud is incapable of precise definition, but the following will indicate the extremely broad scope thereof:

"The term 'fraud' is used in various senses, and fraud assumes so many different degrees and forms that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily on the conscience and judgment of the court or jury in determining its presence or absence. In fact, the fertility of man's invention in devising new schemes of fraud is so great that courts have always declined to define it, reserving to themselves the liberty to deal with it under whatever form it may present itself. Nevertheless, while it has often thus been said that fraud cannot be precisely defined, the books contain many definitions, such as unfair dealing; an artifice by which a person is deceived to his hurt; a wilful, malevolent act, directed to perpetrating a wrong to the rights of others; anything which is calculated to deceive, whether it is a single act or a combination of circumstances, or acts or words which amount to a suppression of the truth, or mere silence; deceitful practices in depriving or endeavoring to deprive another of his known right by means of some artful device or plan contrary to the plain rules of common honesty; the unlawful appropriation

of another's property by design; and making one state of things appear to a person with whom dealings are had to be the true state of things, while acting on the knowledge of a different state of things. Fraud has also been said to consist of conduct that operates prejudicially on the rights of others and is so intended; a deceitful design to deprive another of some profit or advantage; or deception practiced to induce another to part with property or to surrender some legal right, which accomplishes the end desired. Fraud, therefore, in its general sense, comprises all acts, omissions, and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another. . . ." 23 *Am. Jur. Page* 753, *Section 2, Fraud and Deceit*.

Only two cases have passed squarely on what state statute of limitations applies to actions under Section 10 of the Securities Exchange Act of 1934:

Osborne v. Mallory, C.C., S.D., N.Y., (1949), 86 F. Supp. 869; and

Fischman v. Raytheon Mfg. Co., C.C.H. Fed. Sec. L. Rep., Section 90, 505 (C.A. 2, 1951).

In the *Osborne* case, only the third cause of action involved Section 10(b) of the 1934 Act with which we are concerned in the present action, and in referring thereto, the Court said at page 879:

"The applicable statute of limitations to actions under Sec. 17 of the 1933 Act and Sec. 10(b) of the 1934 Act would be that of the forum, since the

two Federal Acts do not provide any period within which suits must be brought under those sections. *Seaboard Terminal Corp. v. Standard Oil Co.*, D.C., 24 F. Supp. 1018; *Dipson Theatres v. Buffalo Theatres*, D.C., 8 F.R.D. 86; *Cope v. Anderson*, 331 U.S. 461, at page 464, 67 S. Ct. 1340, 91 L.Ed. 1602. The applicable statute of limitations of the State of New York is found in the New York Civil Practice Act, Sec. 48(2) and (5), a six year statute."

The sections of the New York Act referred to by the Court are as follows:

"Sec. 48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

* * *

"2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

* * *

"5. Any action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." *New York Civil Practice Act, Sec. 48(2) and (5).*

In the *Fischman* case, the complaint alleged fraudulent conduct in violation of Section 10 as in the *Osborne* and instant case. Judge Frank held that Section 48(2) and (5) of the New York Civil Practice Act applied.

Thus, the only two cases directly in point support plaintiff. In New York a six-year statute applied to both liabilities created by statute and to fraud, so it was not necessary to choose between them. In Washington a two-year statute applies to the former and a three-year statute running from discovery to the latter, so a choice is necessary. If it were assumed that under the New York cases there is doubt as to whether an action under Section 10 of Securities Exchange Act of 1934 is for fraud or a liability created by statute, the applicable rule of construction is well stated in *Noble v. Martin*, 191 Wash. 39, 65; 70 Pac.(2d) 1064, 1076, as follows:

“When there is any doubt as to which of two statutes of limitation is applicable, the longer period will be applied.” (Citing cases).

Defendants contend that the case falls within the two-year limitation of Washington statute, Rem. Rev. Stat. 165, on the assertion that plaintiff seeks a recovery on a “liability created by statute.” It will be conceded that if this action is founded on a “liability created by statute” within the meaning of that phrase as determined by the Washington Supreme Court, the case would be barred by Rem. Rev. Stat. 165. However, defendants err in assuming that a liability *created by* statute is synonymous with a liability *arising out of or under* a statute, and in implying that the present case

is within the former term, whereas, in fact, it falls within the latter. In *Cannon v. Miller*, 22 Wn.(2d) 227, 241; 155 Pac.(2d) 500, 507 (1945), in considering limitation of actions, the Washington Supreme Court said:

“The phrase ‘liability created by statute’ means a liability which would not exist but for the statute. 37 C.J. 783, Limitations of Actions, Sec. 123; 25 Words and Phrases (Perm. ed.) 61 *et seq.*”

In the successor section to *Corpus Juris* referred to by the Washington Court, i.e., 53 C.J.S. Page 1051, Section 83(a), it is stated:

“ . . . The phrase ‘liability created by statute’ or ‘liability created by law,’ within the meaning of such a statute, has been held not to include or extend to actions arising under the common law, . . . ”

Thus, it is apparent that under the interpretation by the Washington Supreme Court of the phrase “liability created by statute” unless an action was unknown to the common law and be simply and purely a creature of legislative action, it is not deemed within the phrase insofar as the two-year catch-all section of the Washington State statute of limitations. It is not to be supposed that the learned counsel for defendants will urge that the ages old action for deceit was unknown to the common law prior to the enactment of the 1934 Act.

Incidentally, the Washington Supreme Court has placed the further limitation on the phrase "liability created by statute" in holding that an action within the meaning of the phrase cannot arise out of "agreement."

"A liability created by statute is one in which no element of agreement enters. It is an obligation which the law creates in the absence of an agreement." *Oregon-Wash. R. & Nav. Co. v. Seattle Grain Co.*, 106 Wash. 1, 8, 178 Pac. 648, 650, 185 Pac. 583.

The present case arises directly out of the contract and agreement for the sale and purchase of plaintiff's stock in defendant corporation.

No Washington decision exactly and squarely similar on its facts to the instant case has been found. The decision most nearly in point on the facts is *Union Trust Co. v. Amery*, 67 Wash. 1; 120 Pac. 539, 540. This was an action *arising out of* or *under* a Washington statute which made it unlawful for the trustees of a corporation:

"to make any division except from net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders or any of them any part of the capital stock of the company, nor to reduce the capital stock of the company, . . ."

except as provided by statute. In this action alleging violation of this section, the Court held as follows:

“The first question presented for our consideration is whether the action is barred by the statute. A reference to the dates stated will disclose that three years had not elapsed between the purchase and sale of the stock and the adjudication of bankruptcy. We think the case falls within the provisions of Rem. and Bal. Code, Sec. 159, subd. 4, which is as follows:

‘Within three years,—

‘An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud’.”

It is respectfully submitted that the judgment of dismissal should be reversed.

Respectfully submitted,

SCARBOROUGH & HARRIS,
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IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

IDALIA O. FRATT,

Appellant,

vs.

JOHN R. ROBINSON *and*
JANE DOE ROBINSON,
Husband and wife, et al,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

O. D. ANDERSON and J. P. HUNTER,
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JAN - 4 1952

IN THE
United States Court
of Appeals
FOR THE NINTH CIRCUIT

IDALIA O. FRATT,

Appellant,

vs.

JOHN R. ROBINSON *and*
JANE DOE ROBINSON,
Husband and wife, et al,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

IDALIA O. FRATT, a widow,

Appellant,

vs.

JOHN R. ROBINSON and JANE DOE ROBINSON, husband and wife; TED R. ROBINSON and JANE DOE ROBINSON, husband and wife; LAURA R. McLEOD and JOHN DOE McLEOD, wife and husband; J. S. ROBINSON, and JANE DOE ROBINSON, husband and wife; and A. W. V. FORD and JANE DOE FORD, husband and wife, individually and as Officers and Directors of Robinson Plywood and Timber Company, a corporation; W. E. DIFFORD and JANE DOE DIFFORD, husband and wife; and SAMUEL P. McGHIE and JANE DOE McGHIE, husband and wife, individually and as agents for the aforementioned defendants, and as agents for the Robinson Plywood and Timber Company; and the ROBINSON PLYWOOD & TIMBER COMPANY, a corporation (formerly known as the Robinson Manufacturing Company),

Appellees.

JURISDICTIONAL STATEMENT

Appellees contend that the District Court did not have jurisdiction and properly dismissed the action but concur that this Court has jurisdiction to review the Order of Dismissal.

STATEMENT OF THE CASE

1. Pleadings Below

In the court below appellees moved to dismiss the complaint under Rule 12 (b) (1) for lack of jurisdiction over the subject matter it ,appearing on the face of the complaint that there is no diversity of citizenship and that the action does not involve a controversy under the constitution or laws of the United States in that:

- (a) The transactions complained of did not involve a security that was ever traded in or upon a Securities Exchange or upon an "over-the-counter" market and are, therefore, not within the purview of the Securities and Exchange Act of 1934, which is set forth in the complaint as the basis of jurisdiction. (Tr. 25-35)
- (b) The Securities Exchange Act of 1934 does not provide a civil right of action for the type of transactions alleged in the complaint. (Tr. 25-35)

and further moved to dismiss the complaint under Rule 12 (b) (6), on the ground that

- (c) There is no allegation that defendants or any of them made use of any means or instrumentality of Interstate Commerce or of the mail or of any facility of any National Securities Exchange in connection with the use or employment of any manipulative or deceptive device in the acquisition of appellants' stock in contravention of Section 10 of the Securities Exchange Act or any rules and regulations of

the Securities and Exchange Commission adopted pursuant thereto. (Tr. 25-35)

- (d) That the action was not commenced within the time limited by law. (Tr. 25-35)

2. The Order Below

By order dated August 16, 1951, the District Court granted appellees' motion to dismiss solely upon ground (a) above and denied appellees' other motions. (Tr. 38)

3. Questions Involved

1. Does the Securities Exchange Act of 1934 apply to an isolated sale of stock where said stock was never registered on a securities exchange and never sold in an "over-the-counter" market?

2. Does the Securities Exchange Act of 1934 provide a civil right of action for the type of transactions alleged in the complaint?

3. Does the complaint allege the use of any means or instrumentality of Interstate Commerce or of the mails or of any facility of any National Securities Exchange in connection with the use or employment of any manipulative or deceptive device in the acquisition of plaintiff's stock in contravention of said Section of the Act or of any rules and regulations of the Securities and Exchange Commission adopted pursuant thereto?

4. Was the action commenced within the time limited by law?

SUMMARY OF ARGUMENT

It is appellees' position that the Securities and Exchange Act of 1934 (15 U.S.C.A., 78a, *et seq.*) does not apply to isolated, door-step sales of stock never registered on any securities exchange and never sold in any "over-the-counter" market and for which there is no market; that section 10 of the Act does not provide a civil right of action but that it is purely a criminal statute; that the complaint does not allege the use of any means or instrumentality of Interstate Commerce or of the mails or any facility of any national securities exchange in connection with the transactions complained of, as required by the Act, and that the action was not commenced within the time limited by law inasmuch as under applicable local law of the State of Washington the period of limitation is two years (not three).

ARGUMENT

1. The Securities Exchange Act of 1934 Applies Only to Securities that Have Been Traded on a Securities Exchange or on an "Over-the-Counter" Market.

(a) Analysis of the Act.

No appellate court has, to our knowledge, decided the question which we now discuss.

There is no averment in the complaint that any of

the stock of the company was or is now listed on a National Exchange or that it was ever traded at any time in an "over-the-counter" market as the latter term was intended by Congress.

The complaint has solely grounded this cause of action on the Securities Exchange Act of 1934 (78 U.S.C.A. 78a, *et seq.*) and, more particularly, Section 10 (b) thereof (15 U.S.C.A. 78j (b)) and Rule X-10b-5 promulgated thereunder by the Securities and Exchange Commission, which statute and rule are set forth below:

"Section 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

"Rule X-10B-5: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Appellees contend that the Act does not and was not intended by Congress to cover transactions in a security unless that security at some time in its history was traded on a National Securities Exchange or in an "over-the-counter" market. In other words, that the term "any security not so registered" as used in Section 10 (b) of the Act refers to securities that have been sold in "over-the-counter" markets and is not a blanket term meaning "all securities." It will be shown that the "over-the-counter" market, as used in the Act, refers to specific types of transactions and is not, as said before, a "catch all" term covering all securities and transactions not conducted through the medium of a National Exchange.

To take jurisdiction of this matter the court must expressly find that the Act (not Rule X-10b-5) applies to all transactions involving the purchase or sale of any security anywhere in the United States regardless of whether such security was dealt with on a National Securities Exchange or upon an "over-

the-counter" market, or whether there was any market whatsoever, so long as the mails or an instrumentality of Interstate Commerce is used. It is submitted that such an interpretation goes far beyond the avowed scope and purpose of the Act.

The general purpose of the Securities Exchange Act of 1934 was set forth by Edward H. Cashion, Counsel to the Corporation Finance Division, Securities and Exchange Commission, in his address "Fraud on the Seller of Securities" before the National Association of State Securities Commissioners, St. Louis, Mo., on December 13, 1944 (mimeographed address on file with S.E.C.) as follows:

"The Securities Exchange Act of 1934 and its subsequent amendments were designed *to regulate trading in securities*—the purchase and sale of securities—*on national securities exchanges and in over-the-counter markets*, and to regulate brokers and dealers. The act and its amendments were designed to strengthen the fraud prevention and disclosure provisions of the prior act." (Emphasis supplied).

A similar statement of its general purpose appears in the 14th Annual Report, Securities and Exchange Commission, 1948, at page 24:

"The Securities Exchange Act of 1934 is designed to eliminate fraud, manipulation, and other abuses in the *trading of securities both on the organized exchanges and in the over-the-counter markets*, which together constitute the Nation's facilities for trading in securities; to

make available to the public information regarding the condition of corporations whose securities are listed on any national securities exchange; and to regulate the use of the Nation's credit in securities trading." (Emphasis supplied).

An examination of the format and context of the Act shows the plan used by Congress in carrying out this purpose.

Section 1 is the short title. Section 2 (15 U.S.C.A. 78b) sets forth in detail the purpose of the act and the evils it seeks to remedy. To interpret properly the subsequent provisions of the Act it is essential to have this section in mind especially since Congress itself was outlining the scope and purpose of the statute:

"Necessity for Regulation

For the reasons hereinafter enumerated *transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets* are affected with a national public interest which makes it necessary to provide for regulation and control of *such transactions* and practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of *fair and honest markets in such transactions*:

(1) *Such transactions* (a) are carried on in large volume by the public generally and in large part originate outside the States in which the *exchanges and over-the-counter markets* are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in *such transactions* are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(4) Frequently the prices of securities *on such exchanges and market* are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buy-

ers and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation *on such exchanges and markets*, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit. June 6, 1934, c.404, § 2, 48 Stat. 881." (Emphasis supplied).

If Congress had intended to regulate and control all transactions in securities, it could have said so in very simple language. For example, it could have said "all securities" or "all transactions." This it did not do. On the contrary, it specifically stated that it was necessary to regulate and control "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets and practices and matters related thereto." Throughout Section 2 (15 U.S.C.A. 78b) the phrases "such transactions" and "such exchanges and markets" are used frequently. Not one expression of intent to regulate all securities transactions appears.

Appellees are not arguing that the Act does not apply to a transaction in a security unless the trans-

action itself took place on a National Exchange or an "over-the-counter" market. If a stock is or was listed on a National Exchange, transactions in that stock which take place off the exchange might well affect the prices for transactions in that security on the exchange. The same is true of private transactions in a security which is commonly traded "over-the-counter." The remaining sections of the Act make it evident that Congress was primarily interested in controlling National Securities Exchanges. Approximately 12 Sections are devoted to this subject, while Section 15 (15 U.S.C. 78o) pertains exclusively to "over-the-counter" markets and are limited to controlling brokers and dealers in "over-the-counter" securities. As will be shown later, Congress decided that there had to be some regulation of these "over-the-counter" markets to make effective the primary regulation of National Securities Exchanges. That the regulation of National Securities Exchanges was the primary purpose of Congress was apparent from House Report Number 1383 wherein it was stated under the heading "The General Purpose of the Bill" as follows:

"To reach the causes of the 'unnecessary, unwise and destructive speculation' condemned by the President's message, this bill seeks to regulate the stock exchanges and the relationship of the investing public to corporations which invite public investment by listing on such exchanges."

This brief resume of the Act itself clearly shows

that Congress intended to control National Securities Exchanges and members thereof and also, the securities traded on such exchanges and in the “over-the-counter” markets, and brokers and dealers whose facilities made up the “over-the-counter” markets. It is submitted that Section 10 (b) (15 U.S.C.A. 78j (b)) fits into this legislative scheme and controls fraudulent transactions with respect to securities that have been or now are registered on an exchange or have been or now are traded in “over-the-counter” markets, regardless of whether the exchange or the “over-the-counter” facilities are used in the specific transactions complained of. On the other hand, the appellant and *amicus curiae* contend that Section 10 (b) is a “catch all” provision which standing alone regulates and controls every individual transaction in every security. It is more than evident that such a construction is not supported by the Act itself and would be expanding its coverage beyond the expressed legislative intent.

(b) Intent of Congress as Expressed by Legislators in Debate of the Bill.

Since Section 2 of the Act is so positive and explicit in setting forth the congressional intent, it would seem that no question of construction is involved. However, if construction is needed, it will be demonstrated beyond any doubt that the Act applies

only to those transactions indicated by appellees. In determining the meaning of a statute or the extent of its coverage, the purpose of Congress is an all important factor. In *U. S. vs. C.I.O.*, 335 U. S. 106, 68 S. Ct. 1349, 92 L. Ed. 1849 (1948) it was said:

“The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion.”

Mr. Rayburn, when he was Chairman of the House Interstate and Foreign Commissioners Committee, which thoroughly considered the bill (H.R. 9323) in substantially its present form, stated:

“The Commission also has power to regulate the over-the-counter markets, but in so doing *they can only regulate the brokers or dealers who create a public market for both the purchase and sale of such securities*, and cannot compel compel corporations not interested in having a public market for their shares to file any statements or submit to any regulation.” (78 Con. Rec. 7701). (Emphasis ours).

Again, Mr. Rayburn said:

“In Section 3 of the Bill, we set forth the definitions; and I shall insert in the Record at this point some further definitions of terms which may be used in connection with the discussions of the bill. . . .”

“‘Over-the-counter market’ as used in this bill, refers to a market maintained off a regular exchange by one or more dealers or brokers. *The market must be maintained both for the purchase and sale of the securities in question.* A dealer or broker who merely undertakes a request to find a purchaser for a person who wants to sell or to find a seller for a person who wants to buy, would not usually be considered to be creating a market. *But the dealer who normally is willing to quote ‘a market,’ i. e., both the price at which he will buy and the price at which he will sell, is creating an over-the-counter market.*” (Cong. Record of 4-30-34, 73d Cong., 2 Sess., Vol. 78, No. 94, P. 7419). (Emphasis ours).

When the bill was debated on the Senate floor the following occurred between Senator C. C. Dill and Senator Alben Barkley:

“*Mr. Dill.* The Senator is a lawyer and he knows that lawyers can make words mean almost anything. If it is the intent of this bill not to include corporations whose stock is not so registered on an exchange or not dealt in over-the-counter, of course, if that is the intent, he, as a legislator, only has to write it in the bill so that there cannot be any question.

“*Mr. Barkley.* Section 2 of the bill itself says that only those are included in the proposed law. Why should any one imagine that someone else will be included in it?” (78 Cong. Recrd, p. 8190).

We are making exactly the same point in this brief as was made by Senator Barkley.

For additional statements by Legislators as to the intent of the bill during the course of its debate see Appendix "A" at page.....64.

(c) The Term "Over-the-Counter" Market Has a Well-Defined Meaning and Does Not Include Every Stock Transaction.

The meaning of the term "over-the-counter" market was well stated by Mr. Rayburn, as above pointed out, and no exception was taken by legislators to it. In addition, it has been well defined by officials of the Securities and Exchange Commission, text writers, professors, bankers, brokers, and business men in the following texts: *The Stock Market*, (1941), Dice, Professor Business Organizations, Ohio State Univ.); *Investment Analysis*, (1946) Prime, (Professor of Finance, A. Y. Union); *The Over-the-Counter Securities Market—What It is and How It Operates*, (1940) John C. Loeser of National Quotations Bureau, Inc. Pub. National Quotations Bureau, Inc., N. Y.; *The Modern Corporation and Private Property*, (1933) Bearle and Means, Pub. The MacMillan Co., N. Y.; *The Security Market*, (1935) Pub. Twentieth Cent. Fund, Inc., N. Y.; The Securities Exchange Act of 1934, Analyzed and Explained, Charles H. Meyer, Pub. Francis Emory Fitch, Inc., Financial Publishers, N. Y.; *Cases and Materials on S.E.C. Aspects of Corporate Finance*, Lois Loss, Associate Gen. Counsel for S.E.C., Philadelphia, May, 1947.

Quotations from the above materials are set forth in Appendix "B" at page.....68

From a reading of these definitions contained in the appendix it is apparent beyond doubt that "over-the-counter" markets do not have the broad meaning contended for by appellant. In order to have an "over-the-counter" market there must exist, as said by Mr. Rayburn, a market maintained *both for the purchase and sale of the securities in question*. If a security, as in the instant case, has never been traded in its history on such a market it unquestionably is not covered by the act. It is interesting to note, as shown by the contents of App. "B", that the Securities and Exchange Commission itself concurred with this point of view from 1934 to 1942.

Even more startling is that the Securities and Exchange Commission as late as 1941, in the case of *In the Matter of Barrett & Co.*, 9 S.E.C. 319, 329 (1941) definitely and positively expressed the view that an "over-the-counter" market is a market made by brokers, and dealers; a view absolutely contrary to its position as *amicus curiae* in the present case. For a full quotation from the *Barrett* case, *supra*, expressing the Commission's earlier view, see Appendix "B", page ..76.

The appellant and the Securities and Exchange Commission, as *amicus curiae*, are now vigorously contending that the term "over-the-counter" market in-

cludes an isolated door-step sale of a security which has no "market." Even the case of *Robinson vs. Difford* (E.D. Pa. 1950) 92 F. Supp. 145, so strongly relied upon by appellant and *amicus curiae*, rejects their point of view in this regard. Indeed, Judge Grimm in the *Difford* case definitely recognized that an "over-the-counter" market is a particular type of market as contended for by appellees and as defined by the authorities above set forth. On page 148 of the *Difford* opinion in footnote 3, Judge Grimm defines an "over-the-counter" market as follows:

"Securities traded in the over-the-counter market may be defined generally as those securities not registered on a National exchange *which are traded through a securities broker or with a securities dealer.*" (Emphasis ours)

Thus it will be noted that even in the case of *Robinson v. Difford*, *supra*, that the court rejected appellant's point of view that a "door-step" sale of stock constitutes a sale in the "over-the-counter" market because, as set forth above, an "over-the-counter" market only includes stocks that are "traded through a securities broker or with a securities dealer."

(d) This Act is a Criminal Statute and Must be Strictly Construed.

The Securities Exchange Act of 1934 is a criminal statute. Section 32 (15 U.S.C.A. 78ff) provides a \$10,000.00 fine, two years imprisonment, or both, for

violation of the Act, or the Rules promulgated thereunder. Therefore, the Act, being criminal, must be strictly construed. In *Wright v. Securities and Exchange Commission*, 112 F. (2d) 89 (1940) the court said:

“The statute (S.E.C Act of 1934) must be strictly construed since a violation of it may be punished as a crime.”

One of the oldest cases on this subject is *United States v. Wiltberger*, 34 U. S. 73, 5 Wheat. 76, 95, (1820) wherein Chief Justice Marshall stated:

“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.”

Accord: Todd v. U. S., 158 U. S. 278, 15 S. Ct. 889, 39 L. Ed. 982 (1895); *U. S. v. Harris*, 177 U. S. 305, 20 S. Ct., 609; 44 L. Ed. 780 (1900); *Prussian v. U. S.*, 282 U. S. 675, 51 S. Ct. 223; 75 L. Ed. 610 (1931) and *U. S. v. Fruit Growers Express Co.*, 279 U. S. 363, 49 S. Ct. 374; 73 L. Ed. 739 (1929).

Obviously, if there is a civil right of action under Section 10 (b) it only arises because of the commission of a crime. It is more than apparent, therefore, that Section 10 (b) cannot be more broadly construed for civil purposes than for criminal purposes. If the court holds otherwise it will be lifting its jurisdiction by its own bootstraps.

(e) Limited Application of the Words "Any Security Not So Registered."

Section 10 (b) (15 U.S.C.A. 78j) of the Act refers to transactions in "any security registered on a National Exchange or any security not so registered." Under well established rules of statutory construction this does not mean transactions in "any security" without limit, but must mean transactions in those securities specifically covered by the Act. In this case, the Act covers transactions in any security registered on a National Securities Exchange or dealt with in the "over-the-counter" market *and no more*.

In *United States v. Katz*, 271 U. S. 354, 46 S. Ct. 513, 70 L. Ed. 986 (1926) defendants were indicted under the National Prohibition Act which provided "no person shall manufacture, purchase for sale, sell or transport any liquor. . . ." The Court held, in viewing the statute as a whole that, the above quoted section only applied to persons authorized by the other Sections of the Act to deal in liquor under government permit and did not mean "all persons," without limitation. The Court cited *United States v. Jin Fuey Moy*, 241 U. S. 394, 36 S. Ct. 658, 60 L. Ed. 1061 (1916) wherein it was held:

"This court held that the words 'any person' not registered could not be taken to apply to any person in the United States but must be read in harmony with the purposes of the act to refer to persons required by law to register." (P. 516)

Similarly, it is obvious that the words "any security not so registered" must be read in harmony with the purpose of the Securities and Exchange Act of 1934 and be construed to mean "any security traded on an 'over-the-counter' market." Otherwise this section clearly goes beyond the scope of the Act, as limited by Congress itself in Section 2 (78 U.S.C.A. 78b) of the Act quoted above.

In reviewing the various sections of the Securities and Exchange Act it will be noted that when Congress was dealing with situations applicable only to securities dealt with on an exchange, appropriate words indicating that intention were used; e.g. Sections 8, 9, 12, 13 and 16. (15 U.S.C.A., Section 78h, 78i, 78l, 78m, 78p). Nowhere in the Act is there a specific reference to a security trade in an "over-the-counter" market. It seems obvious that Congress, dealing with only two types of securities made the necessary distinction whenever it was required by specifically stating that the Act applied in such instances to a security registered on a National Securities Exchange.

When dealing with both types of securities, Congress, as in Section 10 (b) would merely refer to, first, a security registered on an exchange, and then to any "security not so registered."

Section 15 of the Act (15 U.S.C.A. 78-o) bears the heading "OVER THE COUNTER MARKETS." That heading, being a part of the Act as enacted by Con-

gress, should be considered in construing the statute. *Carter v. Liquid Carbonic Pacific Corporation, Ltd.*, (9th Cir.) 97 Fed. (2d) 1 (1938).

In Section 15, (U.S.C.A. 78-o) where Congress was specifically dealing with "over-the-counter" markets as shown by the heading not once did Congress mention the term. Rather, Congress simply referred to "over-the-counter" markets as securities "otherwise than on a National Securities Exchange." In view of the heading of the Section and the subject matter dealt with it is obvious that Congress by using the term "otherwise than on a National Securities Exchange" was limiting that term in its application to "over-the-counter" markets only.

It will thus be noted that when Congress was referring to a security dealt with on an "over-the-counter" market it merely used the words "any security" with the qualifying words "otherwise than on a National Security Exchange." It seems clear that since Congress, when deliberately defining a security dealt with in "over-the-counter" markets defined it in one place in the act as "any security otherwise than on a National Securities Exchange" that it meant precisely the same thing in Section 10 (b), otherwise it would have included after the words "or any security not so registered" in Section 10 (b), some language such as "including securities not traded in any over-the-counter market."

The fact that Congress has quite wisely, given a broad and all inclusive definition of the word "security" in Section 3 (10) (15 U.S.C.A. 78-c-10) does not refute our argument that the words "any security" had a limited application. This broad definition was made so that full control would be had over the National Exchanges and "over-the-counter" markets for *all types* of securities and had no reference to the markets they were traded in. Our position in this regard is further buttressed by an article appearing in 61 Harvard Law Review, 858, wherein it was said at page 866:

"The determination of what persons and transactions are included may ultimately rest upon inquiry into the evils against which the act was directed. By this test, the introduction to the Securities Exchange Act would suggest that Congress did not intend to include all persons and all purchases and sales of securities. *It would limit application of the rule to 'transactions in securities as commonly conducted upon securities exchanges and over the counter market, and 'practices and matters related thereto, including transactions by officers, directors, and principal security holders'.*" (Emphasis supplied)

(f) Argument In Answer to Appellant—Difford and Trans-America Cases Discussed.

Only three District Courts have directly passed on this subject. The first decided case was that of *Robinson v. Difford*, (E. D. Pa.) 92 F. Supp. 145 (1950),

wherein Judge Grimm found adversely to appellants' position here. The second District Court decision was that of United States District Judge J. Frank McLaughlin of Honolulu, sitting by assignment in the United States District Court for the Western District of Washington, in the instant case, who, without rendering a written opinion, refused to follow Judge Grimm's opinion in the *Difford* case. The third case is that of *Speed v. Trans-America Corp.*, (D. C. Del.) 99 F. Supp. 808, decided August 8, 1951, wherein Judge Leahy, without the benefit of a reported opinion from Judge McLaughlin, followed the holding in the *Difford* case.

The cases cited by appellant as purportedly being decisive of this question are, upon examination, not in point, as the question was never raised or discussed. Without discussing appellant's cases suffice it to say that the court in *Speed v. Tran-America, supra*, at page 831 of the opinion said:

"Judge Grimm has been the first to consider specifically the question whether Section 10 (b) and Rule X-10b-5 apply to transactions in securities not traded on an exchange or in the over-the-counter market."

In an article appearing in 64 Harvard Law Review, 1018 wherein the case of *Robinson v. Difford, supra*, was discussed, the article specifically states:

"This (*Difford* case) is the first explicit ju-

dicial determination that the fraud provisions of Section 10 (b) may be invoked even though the unregistered securities were not of an issue regularly traded.”

Consequently, appellees reach this court with two District Court Decisions against them, one District Court decision in their favor, and no decision by any Appellate Court. For these reasons we discuss the two cases adverse to our contention.

It must be noted that the opinion in *Speed v. Trans-America Corp.*, (D. C. Del.) 99 F. Supp. 808, consists of 41 pages involving many questions but that only approximately one page is devoted to the subject at hand. Indeed, it appears that the court in *Speed v. Trans-America*, not having the benefit of Judge McLaughlin’s opinion in this case and confronted with many other legal questions in the case, simply followed the conclusions reached by Judge Grimm in the *Difford* case. For this reason our criticism of *Robinson v. Difford* applies equally well to *Speed v. Trans-America*.

At the outset, the decision in *Robinson v. Difford*, *supra*, is strongly questioned in a recent article appearing in 64 Harvard Law Review 1018, written prior to the decision in *Speed v. Trans-America*. This article comprises an impartial and scholarly analysis of Judge Grimm’s opinion in the *Difford* case and because we believe that it will be of great aid and assistance to this

court in correctly determining the question we have set forth the entire contents of the article in Appendix "C" at page 79.... However, the following portion of the article is pertinent here:

"Since isolated transactions in securities of closely held corporations do not seem to be affected with a substantial national public interest, at least as determined by Congress in Section 2, it appears unlikely that Congress intended the statute to be applicable to dealings of this character, especially in view of the substantial criminal liabilities imposed for violation of the Act. And whatever doubt may remain concerning the intended scope of the Act should not necessarily be resolved in favor of the S.E.C's interpretation in Rule X-10B-5, since the eight-year delay before promulgation may be an indication of the Commission's doubt as to the validity of its interpretation." Cf. *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 408 (1949).

Indeed, the history of the Security Exchange Commission's actions with respect to the Rules under Section 10 (b) indicates that even the commission itself did not believe that it had the broad power it now, as *amicus curiae*, contends for. In construing the scope and meaning of Section 10 (b) of the act one cannot overlook the fact that eight years elapsed before the Security Exchange Commission promulgated Rule X-10b-5, which was released on May 21, 1942. In this respect the language of the Supreme Court in *Federal Power Commission v. Panhandle Eastern Pipe Line*

Co., 337 U. S. 498, 513, 69 S. Ct. 1251 (1949) is in point. The court said:

“Thus for over ten years the Commission has never claimed the right to regulate the dealings in gas acreage. Failure to use such an important Power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production. If possible all Sections of the Act must be reconciled so as to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.” (Emphasis ours)

Accord: Federal Trade Commission v. Bunte Bros., 312 U. S., 349, 85 L. Ed. 881, 884, 61 S. Ct. 580; *Norwegian Nitrogen Produce Co. v. United States*, 288 U. S., 294, 315, 77 L. Ed. 796, 807, 53 S. Ct. 350.

It is inconceivable that a “loop-hole” could have existed for eight years without remedial action of any kind by the Commission, if the Commission believed that it had authority to block the “loop-hole” by the adoption of Rule X-10b-5 in 1942.

We think that the court in the case of *Robinson v. Difford*, arrived at a wrong result and that it was reached through entirely erroneous reasoning and in

complete disregard of well established rules relating to statutory construction.

The court simply disposes of the argument that the Act does not cover transactions in securities neither registered on an exchange nor traded in an "over-the-counter" market by quoting from Section 10 of the Act these words, "any security not so registered" and then in complete disregard of the contents of Section 2 of the Act comes to the startling conclusion that the language of Section 10 (b) is clear and no other interpretation is possible. The court says on page 148 of the *Difford opinion*:

"Without deciding that these statements do show such a limited purpose as is contended by defendants, this court must refuse defendants' contention, because Section 10 (b) itself, under which the present action was brought, is unambiguous."

The foregoing statement is not only contrary to the opinion of Judge McLaughlin in the court below but is also contrary to the well established rule that a statute or an act must be construed as a whole. One section cannot be isolated and read alone.

In *Hellmich v. Hellman*, 276 U. S. 233, 236-237, 72 L. Ed. 544, 546-547 (1927) it was held that in construing the meaning of the word "dividend" that §201 (a) could not be isolated and read alone must be read with § 201 (c) as a whole. To the same effect is *Aluminum Co. of America v. U. S.*, 123 F. (2d) 615, 618-619

(3rd Cir. 1941) where it was said, "and a court will adopt that construction which gives effect to all parts of a statute to the end that the manifest purpose of Congress will not be obstructed." *Bowe v. Judson C. Burns, Inc.*, 137 F. (2d) 37 (3d Cir. 1943) held that, "legislative intent must be drawn from the (Fair Labor Standards) Act as a whole." In *Dahlberg v. Pittsburgh, & L. E. R. Co.*, 138 F. (2d) 121, 122 (3d Cir. 1943) it was held in construing a statute that, "words may not be taken out of their context and endowed with an absolute quality, nor may the plan of the entire statute be disregarded." *Southland Gasoline Co. v. Bayley*, 319 U. S. 44, 47, 87 L. Ed. 1245, 1248 (1942) in construing the Fair Labor Standards Act held that both sections of an important general statute must be read together. In interpreting the Federal Food and Cosmetics Act it was held that, "the guaranty clause cannot be read in isolation." *U. S. v. Dotterweich*, 320 U. S. 277, 180, 288, L. Ed. 48, 55 (1943). In *Federal Power Comm. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 514, 93 L. Ed. 1499, 1509 (1948) it was said that "If possible, all sections of the (Natural Gas) Act must be reconciled so as to produce a symmetrical whole."

This general rule, to which we know of no exception, has likewise been applied to the Securities and Exchange Act of 1934. In *Wright v. Securities and Exchange Commission*, (2d Cir. 1940) 112 F. (2d) 89, it

was held that, "Under the most elementary principles of statutory construction section 27 must be so interpreted, if possible, as to be consistent with other provisions of the statute." The court in *Hawkins v. Merrill, Lynch, etc.*, (W. D. Ark., Ft. Smith Div. 1949) 85 F. Supp. 104, 121, said:

"The provisions of the Securities and Exchange Act of 1934, and the regulations promulgated thereunder, should be interpreted in the light of the evils to be prevented by the enactment of that legislation."

The Court, in *Robinson v. Difford*, committed, in our opinion, another fundamental error when on page 148 of the opinion it said:

"There are no other sections of the Act which indicate that Congress intended to limit the application of the act to the transactions involving either registered securities or unregistered securities traded in the over-the-counter market."

The above sentence in itself is not plain, but the court must have meant "no other sections" than Section 2. If, as the court said, resort need only to be made to Section 10 (b) itself, then of course, the sentence above quoted is superfluous because the court would not be concerned with other sections of the Act.

The court in the *Difford* case on page 148 of the opinion further said:

"Reliance on the preamble statement of Section

2 in order to alter the plain and unambiguous provisions of Section 10 (b) would violate a basic canon of statutory construction, that statements in a preamble may be referred to only for the purpose of clarifying an ambiguity in a statutory provision."

The only way the court could find Section 10 (b) unambiguous was to refuse to read the entire Act as a whole, which refusal violates, as already pointed out, an elementary principle of statutory construction. When the entire Act is read as a whole the ambiguity of Section 10 (b) is most apparent. The ambiguity was apparent to Judge McLaughlin in the court below.

In the second place, Section 2 is not a preamble, but is a so-called "policy section." Sutherland Statutory Construction, Vol. 2, Section 4820 (3d Ed. 1943) states the rule as follows:

"In place of a preamble it has become common, particularly in Federal legislation, to include a policy section which states the general objectives of the act in order that administrators and courts may know its purposes. This is frequently of significance where the enforcement of the act depends principally upon administration and the administrative officers have not participated in the preparation of the legislation."

Illustrative of this rule is *Department of Labor, etc. v. Unemployment Comp. Board*, (Pa.) 24 A. (2d), 667 (1942).

"Section 3 of Article I (Preliminary Provisions)

of the Unemployment Compensation Law, Act of December 5, 1936, P. L. 1937, p. 2897, 43 P. S. Section 752, constitutes a Declaration of Public Policy with respect to the aims and purposes of the legislature in establishing a system of unemployment compensation. *It is not a mere preamble to the statute, but a constituent part of it and is to be considered in construing or interpreting it.*" (Emphasis supplied)

In refusing to consider Section 2 of the Act the Court in the *Difford* case ignored decisions from Federal Courts holding to the contrary. The following cases hold that the policy section of an act must be read and construed with the entire Act: *Dept. of Labor, etc. v. Unemployment Compensation Board*, (Pa.) 24 A. (2d) 667 (1942); *Securities and Exchange Commission v. Torr*, (S. D., N. Y. 1936) 15 F. Supp. 315, 319-320; *Grossman v. Young*, (E. D. Wis. 1937) 70 F. Supp. 970, 972; *Smolowe v. Delendo Corp.*, 46 F. Supp. 758, 761, 762-3 (S. D., N. C. 1942) Aff. 136 F. (2d) 231 (2d Cir. 1943); *North American Company v. Securities and Exchange Commission*, 327 U. S. 686, 701-702, 90 L. Ed. 945, 957 (1945); *Doyle v. Milton*, (S. D., N. Y. 1947) 73 F. Supp. 281, 284, 285; *Illinois Natural Gas Co. v. Central Illinois P. S. Comm.*, 314 U. S. 498, 86 L. Ed. (1942); *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591, 610, 88 L. Ed. 333; *Federal Power Comm. v. East Ohio Gas Co.*, 338 U. S. 464, 468-469, 94 L. Ed. 268, 275; *U. S. v. Wittek*, 337 U. S. 346, 352, 93 L. Ed. 1406 (1948).

The following are quotations from some of the foregoing cases:

Securities and Exchange Commission v. Torr, (S.D. N.Y. 1936) 15 F. Supp. 315, 319-320 in considering the Securities and Exchange Act of 1934 based its decision largely upon the findings set forth in Section 2 of the Act and held:

“... But we have the express finding by Congress, in Section 2 of the 1934 Act (15 U.S.C.A. Section 78b), that transactions in securities exchanges are carried on in large volume by the public generally and in large part originate in other states, that they constitute an important part of the current of interstate commerce, that such transactions are susceptible to manipulation and control, resulting in sudden and unreasonable fluctuations in prices and in great damage.

“In support of these findings Congress had before it voluminous reports of committees that investigated practices in securities dealings.

“Such findings, while not conclusive on the courts, are presumptively sound. They may be overthrown by contrary findings of greater weight, based on facts of common knowledge or on other facts judicially noticed, or on facts proved by the parties asserting invalidity of the statute; but until so overthrown the facts found by the Legislature are to be taken as true. In addition there is always the presumption that the underlying facts support the constitutionality of legislation. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Ca. 1912 C, 160; *Block v. Hirsh*, 256 U. S. 135, 154,

41 S. Ct. 458, 64 L. Ed. 865, 16 A.L.R. 165; *O'Gorman & Young v. Hartford Ins. Co.*, 282 U. S. 251, 257, 258, 51 S. Ct. 130, 75 L. Ed. 324, 72 A.L.R. 1163; *Borden's Co. v. Baldwin*, 293 U. S. 194, 209, 55 St. Ct. 187, 79 L. Ed. 281; 38 Harvard Law Review, page 6."

Grossman v. Young, (E. D. Wis.) 70 F. Supp. 970, 972 involving the Securities Exchange Act of 1934, held:

"... It is the use of inside information in trading on the national exchange and the use of interstate instrumentalities which create the liability. The underlying reasons for this are fully set out in Section 2 of the Act, 15 U.S.C.A. Section 78b—to protect interstate commerce, the national credit, the Federal taxing power, the national banking system, to insure the maintenance of fair and honest markets, to stabilize prices and to prevent excessive speculation and national emergencies."

Smolowe v. Delendo Corporation, (S.D. N.Y. 1942) 46 F. Supp. 758, 761, 762-3, *Aff.* 136 F. (2d) 231 (2d Cir. 1943) also involving the Securities Exchange Act of 1934, held:

"If the section quoted does not apply to the sales and purchases set forth, there will be no need to determine its constitutionality. The first question, therefore, is directed to the application of the section.

"It seems to me that a particular aid in this respect would be to see what wrongs, practices or transactions Congress sought to prohibit, regulate or remedy. In Section 2 of the Act. Congress found that transactions in securities on exchange, or in

over-the-counter markets were affected with a national public interest, and that it was necessary to provide for their regulation and control, including transactions by officers, directors and principal security holders. It deemed this necessary, among others to protect interstate commerce, the national credit and the Federal taxing power, as well as to protect and make more effective the national banking and Federal Reserve systems. It sought to 'insure the maintenance of fair and honest markets in such transactions.' Among other important elements, it distinctly recognized that such transactions constituted an important part of the current of interstate commerce, involved in large part securities of issuers engaged in interstate commerce, affected the national credit, and that the prices established and offered in such transactions constituted a basis for determining prices at which securities are bought and sold. Congress sought, among other things, to control excessive speculation, sudden and unreasonable fluctuations in prices, with their evils of unreasonable expansion and contraction of credit, and the precipitation, intensification and prolongation of national emergencies of unemployment and dislocation of trade and industry. These are some of the matters sought to be comprehended within the four corners of the Act. They have particular significance to the questions here involved.

"The primary purpose of the Securities Exchange Act—as the declaration of policy in Section 2, 15 U.S.C.A. Section 78 (b), makes plain—was to insure a fair and honest market, that is, one which would reflect an evaluation of securities in the light of all available and pertinent data."

North American Co. v. Securities & Exchange Com., 327 U.S. 686, 701-702, 703, 704, 90 L. Ed. 945, 957 (1945) involving Public Utility Holding Company Act of 1935 (15 U.S.C.A. 79r) held:

“And Congress has plainly recognized that relationship in its declarations of policy in § 1 (a), in its enumeration of abuses in § 1 (b) and in its description of interstate activities of holding companies in § 4 (a). Such statements would be utterly meaningless in the light of reality were they not premised upon the ownership of securities by holding companies and the use of that ownership to burden and affect the channels of interstate commerce.”

Doyle v. Milton, (S.D. N.Y. 1947) 73 F. Supp. 281, 285 involving the Investment Company Act, held:

“The Investment Company Act is a carefully framed statute in which Congress has, with particularity, stated the means and methods, both judicial and administrative, by which its declaration of policy is to be executed. It has not confided in the Courts a broad discretion to shape judicially contrived remedies for the mischief it has discovered. Insofar as power is entrusted to the courts under this Act its exercise must, of course, be steered toward the fulfillment of the national policy as declared. *The policy itself, however, when declared in a statute as comprehensive and detailed as this Act, does not authorize the courts to fashion sanctions withheld by Congress.*” (Emphasis ours).

Illinois Natural Gas Co. v. Central Illinois Public

Service Co., 314 U. S. 498, 506-507, 86 L. Ed. 471 (1942) involving the N.G.A., held:

“An avowed purpose of the Natural Gas Act of June 21, 1938, was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation. H. Rep. No. 709, Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., April 28, 1937. By its enactment, Congress undertook to regulate a defined class of natural gas distribution, without the necessity, where Congress has not acted, of drawing the precise lines between State and Federal power by the litigation of particular cases. By § 1 (b) 15 U.S.C. § 717 (b), the Act is restricted in its application ‘to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas copanies engaged in such transportation or sale.’”

The court in the *Difford* case ignored the extensive legislative materials cited in the briefs, when on page 148 of the opinion it said:

“Likewise, the legislative history of an act may not properly be considered in construing an unambiguous statutory provision such as Section 10 (b).”

In the first place, the court is making an unwarranted assumption because, as we pointed out above,

the court finds Section 10 (b) unambiguous by refusing to construe the entire Act as a whole. Such casual disregard of the extensive legislative materials cited in the briefs must come as a surprise to anyone who reads the Federal Advance Sheets and particularly those of the Supreme Court, knowing that of recent years the Supreme Court in particular has resorted to legislative history as well as to legislative materials in almost every case where a problem of statutory construction is before it.

In *United States v. American Truckers Association, Inc.*, 310 U. S. 534, 543, 84 L. Ed. 1345, (1940) the court said:

“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination’.”

In this connection see the dissenting opinion of Justice Frankfurter in *United States v. Monia*, 317 U. S. 424, 431, 87 L. Ed. 376 (1943) wherein it was said:

“This question cannot be answered by closing our eyes to everything except the naked words of the Act of June 30, 1906. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious over-simplification. It is a wooden English doctrine of a rather recent vintage (see Plucknett, a Concise History of the Common Law, 2d Ed., 294-300; Amos, the Interpretation of Statutes, 5 Camb. L. J. 163;

Davies, *The Interpretation of Statutes*, 35 Col. L. Rev. 519, to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. E.g., *United States v. Fisher*, 2 Cranch 358, 385-86; *Boston Sand Co. v. United States*, 278 U. S. 41, 48; *United States v. American Trucking Assns.*, 310 U. S. 534, 542-44. A Statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. And so we must turn to the history of Federal immunity provisions.”

In the case of *Commissioner of Internal Revenue v. Estate of Church*, 335 U. S., 632 and 687 93 L. Ed. 289, at 321 (1948) where Justice Frankfurter under the heading of “Decisions During the Past Decade in Which History was Decisive of Construction of a Particular Statutory Provision” lists two and one-half pages of citations.

Without reviewing the mass of case law on this subject suffice it to say that the following citations clearly presents the practice of the Supreme Court of the United States.

In *United States v. Dickerson*, 310 U. S. 554, 561-

562, 84 L. Ed. 1356, 1362 (1939) the court said:

“The respondent contends that the words of Sec. 402 are plain and unambiguous and that other aids to construction may not be utilized. It is sufficient answer to deny that such words when used in an appropriation bill are words of art or have a settled meaning. See *United States v. Perry*, 50 F. 743, 748 (C. C. A. 8th). The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. legislative materials may be without probative value, or contradictory or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co. v. United States*, *supra*, at 48. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.”

In *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479, 87 L. Ed. 407, 410, the Supreme Court said:

“ . . . In so doing, the court below refused to examine the legislative history of § 807, on the ground that the section was unambiguous.

“But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how ‘clear the words may appear on superficial examination’.”

It is appellees’ position that Judge Grimm arrived

at a wrong result in the *Difford* case because he got off to a wrong start when he found Section 10 (b) unambiguous. Judge Grimm simply read Section 10 (b) of the Act and from a reading of this particular section in isolation from the others came to the conclusion that Section 10 (b) was not ambiguous in that the language was plain that it covered "any security registered on a National Securities Exchange or *any security not so registered.*"

From a reading of this particular section in isolation Judge Grimm concluded that this section of the Act was not ambiguous by reasoning that a security "not so registered" would automatically cover any other security whether sold in the "over-the-counter" market or not. At this point it should be kept in mind that Judge Grimm definitely recognized an "over-the-counter" market as being limited in its scope and not covering all sales of securities. See footnote 3, p. 148 of *Difford* opinion. Electing to isolate Section 10 (b) of the Act from the remainder thereof it was quite easy for Judge Grimm to find that Section 10 (b) *standing by itself* was not ambiguous. Having arrived at this result he then concluded that there was no need to examine what he erroneously termed the "preamble" of the Act nor was it necessary to examine the legislative materials submitted to him. However, it is our opinion that Judge Grimm committed error in the first premise of his reasoning when he elected to read Section 10 (b) in isolation from the remainder of

the Act and then simply found Section 10 (b) unambiguous. As has already been pointed out, nothing is more fundamental in statutory construction than that the entire Act must be read and construed as a whole and that one section cannot be isolated and read apart from the other sections. THE TEST IS NOT WHETHER SECTION 10 (b) IS AMBIGUOUS BUT RATHER, WHETHER THE ENTIRE ACT TAKEN BY ITS FOUR CORNERS IS AMBIGUOUS. When the entire Securities and Exchange Act of 1934 is read as a whole it becomes more than apparent that the term "any security not so registered" as used in Section 10 (b) of the Act has a particular and definite meaning and is simply another way of referring to securities that are sold in an "over-the-counter" market. This conclusion is plain from a reading of Section 2 of the Act. Section 2 is not a "preamble" but is a part of the Act itself. Section 2 definitely limits the coverage of the entire act to securities that are sold on a National Securities Exchange or traded in an "over-the-counter" market. IT IS ONLY THESE TWO TYPES OF TRANSACTIONS THAT CONGRESS WAS REGULATING. Thus, when the entire act is read as a whole Section 10 (b) must be read in conjunction with Section 2 and when this is done it becomes apparent that Section 10 (b) cannot be read literally but must be read in harmony with Section 2.

It seems plain to appellees and likewise it seemed plain to Judge McLaughlin below that had Congress

intended Section 10 (b) to apply to transactions in *all securities* as a "blanket" proposition that all Congress would have to do was use the words "all securities" or "all transactions." Instead, Congress used the peculiar words "any security not so registered," and to find the meaning of this latter term one must read the entire Act and particularly Section 2 thereof.

Where a general statute consists of numerous sections as does the Securities and Exchange Act of 1934 anyone can pick out one particular section of any act and find that that particular section standing alone and isolated from the others, is not ambiguous. Ambiguity, if any, in a general statute, only arises, if it does at all, when all sections are read and construed together. Had Judge Grimm applied the test of ambiguity to the entire act rather than to just one section thereof, he would have found as did Judge McLaughlin in the court below, that either section 2 of the Act itself plainly limited the coverage of the Act to Securities that had been sold on a National Securities Exchange or in an "over-the-counter" market or if such was not plain from the reading of the Act itself, that there was sufficient ambiguity in the entire act to make resort to legislative materials both necessary and proper.

Digressing for a moment to *Speed v. Trans-America Corp.*, the court on page 830 of the opinion said:

"In short, Congress did not intend to limit ap-

plication of the Act to transactions on exchanges and in the organized over-the-counter markets maintained by brokers and dealers.”

In face of the specific limitation made by Congress in Section 2 of the act itself and confronted with positive statements as to the meaning of the term “over-the-counter” by Vice-President Barkley and Speaker Rayburn (then members of the Senate and House respectively) during the debate on the bill, together with definitions from other legislators, writers and Security and Exchange Commission officials we cannot account for the above conclusion so confidently reached by Judge Leahy in the *Trans-America* case unless it was that he did not have the benefit of Judge McLaughlin’s views and was not presented, by way of briefs, the materials submitted here.

Also, while touching upon the case of *Speed v. Trans-America* there appears on page 830 of the opinion, footnote 11, a statement of Wallace R. Fulton, Executive Director of National Association of Securities Dealers, Inc., which, at first glance, would seem to be counter to our definition as to what constitutes “over-the-counter” markets. However, Mr. Fulton’s statement is taken out of context and if his entire statement is read it becomes apparent that he is discussing a market maintained by brokers and dealers off a regular exchange. For Mr. Fulton’s full statement see Appendix “B”, page 77.

This court may well take judicial notice that there are many small family corporations in the United States operating corner meat markets, neighborhood garages and other small businesses. By and large, this stock is never sold unless it be to an employee, relative or friend. There is no established market for it, "over-the-counter" or otherwise. Manifestly, it was never the intent of Congress to control or regulate a sale of stock when, for example, the owner sold a few shares to his son in the armed services, even though the check in payment thereof was sent by mail. Such a transaction involves no National public interest.

In reviewing the opinion of Judge Grimm in the *Difford* case and observing the casual manner in which he brushed aside Section 2 of the Act, which Section was a deliberate statement of intent and purpose, and also ignored the volume of legislative material submitted to him one can only read in an ironical fashion Senator Alben Barkley's remarks during debate on the bill:

"*Mr. Barkley.* Section 2 of the bill itself says that only those are included in the proposed law. Why should anyone imagine that someone else will be included in it."

We are making the precise point in this court that Senator Barkley made on the Senate floor and we agree with Judge McLaughlin in the court below when he refused to follow the holding of the *Difford* case and only wish that Judge McLaughlin's views had been

made available to Judge Leahy prior his deciding the *Trans-America* case.

The Securities and Exchange Commission at page 58 of their brief as *amicus curiae* frankly admit that two Harvard Law Review articles do not support the Commission's contention in this matter. (61 Harvard Law Review 858, quoted at page 22 of appellee's brief, and 64 Harvard Law Review 1018, quoted in full in Appendix "C," page 79 of appellees' brief.) The Commission apparently argues that because these are student articles, and also appear to be summary of appellees' argument, that little weight should be given to them. However, it seems to us, that when two student articles, written at different times, definitely support appellees' position in this case that although not binding as precedent, such articles should be given considerable weight. Whether a Law Review article is written by a student, under the supervision of his Professor, or whether it is written by the Professor alone, is beside the point. The only question to be asked is whether or not the article stands the test of reasoning and analysis. If it does it should be accorded considerable weight in any forum

Appellees fully realize that the Securities and Exchange Commission is desirous of extending its powers to cover all stock transactions, even the isolated doorstep sales, and however meritorious this policy might be we strongly feel that such can only be accomplished by Congress and not by the Courts.

The Securities and Exchange Commission, in an effort to minimize the persuasive impact of the Legislative debate upon the bill, argue, on page 48 of their brief, that the legislators who participated in the debate were not discussing the "concept of the scope of the over-the-counter market generally," but were limiting their discussions to Section 15 (2) of the Act. We certainly cannot agree with the Commission in this respect. The facts are clearly against their contention.

The statement made by Mr. Rayburn, *supra*, as to the meaning of the term "over-the-counter market," was not limited merely to Section 15 (2). Indeed, Mr. Rayburn said:

"'Over-the-counter market,' *as used in this bill*, refers to a market maintained off a regular exchange by one or more dealers or brokers. The market must be maintained both for the purchase and sale of the securities in question . . ." (Emphasis ours).

Note Mr. Rayburn's language, "*as used in this bill*." How, then, can it seriously be argued that he was limiting his remarks to Section 15 (2) only?

The Court's attention is respectfully invited to the colloquy on the Senate floor, between Senator Dill and Senator Barkley, the context of which appears earlier in this brief. Senator Dill said, in part:

"*It is the intent of this bill* not to include corporations whose stock is not so registered on an

exchange or not dealt in over-the-counter”
(Emphasis supplied).

To which Mr. Barkley replied:

“Section 2 of *the bill itself* says that only those are included in the proposed law. Why should anyone imagine that someone else will be included in it?” (Emphasis supplied).

Again it must be observed that both Senators Dill and Barkley were talking about “*the bill*” and not just Section 15 (2).

Attention is again invited to the remarks of Senator Steiwer’s (78 Cong. Rec. 8189) set forth in Appendix A, p. 67 The Senator said, in part, as follows:

“In the first place, *this bill* deals with stock exchanges, and with the regulation of the over-the-counter market.” (Emphasis supplied).

We find nothing limiting Senator Steiwer’s remarks to Section 15 (2). On the contrary he is speaking about the entire bill.

To the same effect are the statements made by Representative Maloney (78 Cong. Rec. 7869) set out in Appendix A, and quoted, in part, below:

“A dealer or broker creates or maintains an over-the-counter market *as it is defined in the bill* only if he stands ready both to buy and sell.” (Emphasis supplied).

It seems more than apparent that Mr. Maloney was speaking of an over-the-counter market “*as it is de-*

joined in the bill" and we find no indication that his remarks were expressly limited to Section 15 (2).

To argue, as does *amicus curiae*, that the foregoing statements, which constitute an important part of the legislative history of the Securities Act of 1934, are limited to Section 15 (2) only, and do not apply to the entire Act, is indeed unique, but not, in our opinion, equally convincing.

The Securities and Exchange Commission on page 64 of their brief are concerned that appellees' construction of the act (and presumably Judge McLaughlin's also) would in substance mean that a fraudulent transaction in a security which had never been registered on a national exchange or sold in an "over-the-counter" market could not be remedied under the Federal Act but only under local State law. The Commission complains about the insufficiency of many, if not most, state laws to deal effectively with such transactions. Finally, the Commission concludes that "such a view of the scope of the Federal statute would 'turn back the clock' a long way."

We do not agree and apparently Congress did not agree that the state laws are as inadequate as the Commission believes for it must be remembered that it was Congress, and not the courts, that limited the application of the Act to securities registered on a national exchange or sold in an "over-the-counter" mar-

ket. Indeed, the only question to be determined by this court, with reference to the subject matter at hand, is whether the sale of a security that has never been registered on a national exchange or sold in an "over-the-counter" market is within the purview of Section 10 (b) of the Securities and Exchange Act of 1934. Appellees are not contending that Congress could not have regulated such a transaction. All we are saying is that Congress, not deeming such transactions affected with a sufficient national interest, simply did not elect to use its regulatory powers in this particular respect. If the Federal Act in its present form and as construed by Judge McLaughlin and the various law review writers is not, in the opinion of the SEC, broad enough to sufficiently protect the national interest, then it seems to us that the Securities and Exchange Commission should invite congressional attention to this fact rather than urge the courts to expand the legislative intent. Courts cannot and should not enlarge or expand a statute, particularly a criminal statute, beyond the limits fixed by Congress. Neither should courts nor lawyers who correctly interpret a statute be necessarily charged with "turning back the clock." At this point it might be well to inquire upon what basis the clock has ever been "turned ahead." No appellate court has ever approved the all-inclusive construction of the Securities and Exchange Act of 1934 as now contended for by *amicus curiae*. As a matter of fact, and regardless of what is said in the Com-

mission's brief, it is doubtful whether the Securities and Exchange Commission itself has ever actually acknowledged the enlarged construction of the act for which they are now arguing.

There is one thing about the Commission's present position, as *amicus curiae*, which is unusually startling to us. In their brief as *amicus curiae* they are contending (1) that the Act covers all security transactions without any limitation whatever, and (2) that the sale of any security, other than on a national exchange, is a sale in the "over-the-counter" market. Such has not always been their position and there is some doubt in our mindss whether it is in fact their sincere position at this time—especially when the commission and its officials have consistently heretofore offered a contrary view. Earlier in this brief we set forth a portion of an address entitled "Fraud On The Seller of Securities" by Edward H. Cashion, Counsel to the Corporation Finance Division, Securities and Exchange Commission (1944) wherein, as attorney for the Commission, he said in part:

"The Securities Exchange Act of 1934 and its subsequent amendments were designed to regulate trading in securities—the purchase and sale of securities—*on national exchanges and in over-the-counter markets, and to regulate brokers and dealers.*" (Emphasis ours).

As late as 1944 Mr. Cashion was of the opinion that

the act only applied to securities on national exchanges and in the "over-the-counter" markets.

As late as 1948 the Securities and Exchange Commission itself in their 14th Annual Report at page 24 said, in part:

"The Securities Exchange Act of 1934 is designed to eliminate fraud, manipulation, and other abuses in the trading of securities *both on the organized exchanges and in the over-the-counter markets, which together constitute the nation's facilities for trading in securities. . . .*" (Emphasis ours).

Again, no mention is made by the Commission that the Act was designed to cover every transaction in securities as a blanket proposition.

Although the commission now argues that the term "over-the-counter" market includes all securities not sold on a national exchange, yet such a contention has not always been the case. The court will no doubt notice that the Commission's brief, as *amicus curiae*, as shown on the cover, was prepared under the direction of *Mr. Louis Loss, Associate General Counsel for the Commission*. *Mr. Loss* in the Commission's brief now argues that the term "over-the-counter" includes all security transactions not occurring upon a national exchange. It is hard for appellees to reconcile *Mr. Loss's* position as argued in the Commission's brief, especially when the *same Mr. Loss* as late as 1947 distributed mimeographed material entitled "Cases and

Materials on SEC Aspects of Corporate Finance,” (Philadelphia, May, 1947), and on page 119 said:

“The over-the-counter markets, in general, are the unorganized markets in which there are meetings of individual supply and demand as contrasted with the organized markets or exchanges where there are meetings of collective supply and demand. *Over-the-counter transactions take place in the office of brokers and dealers and do not involve the trading facilities of an exchange.*” (Emphasis ours).

If, as *Mr. Loss* said in 1947, “over-the-counter transactions take place in the offices of brokers and dealers,” we, as appellees, find it exceedingly difficult to comprehend *Mr. Loss’s* present position where, on page 40 of the Commission’s brief, he informs this court that Judge Grimm’s definition of the term “over-the-counter” markets as set forth in footnote 3, page 148 of the *Difford* opinion “improperly narrows the concept of over-the-counter markets.” This is especially not understandable when *Mr. Loss’s* earlier definition in 1947 and Judge Grimm’s definition in the *Difford* case both recognize the concept that the “over-the-counter” markets involves securities traded through brokers and dealers.

In view of the Commission’s earlier construction of the Act, which nearly paralleled appellees’ present position, we are at somewhat of a loss to understand how the Commission can now reasonably justify its complete reversal and argue, in their brief, contrary to their previous public statements.

It seems to us, as it apparently did to Judge McLaughlin, that the result in the *Difford* case is erroneous because the court failed to take into consideration the following:

- (1) The purpose and scope of the Act as it appears from an analysis of all its provisions.
- (2) The express limitation of the Act as set forth Section 2.
- (3) The Commission's inaction with respect to the issue in question for a period of eight years.
- (4) The conclusions reached by the Senate and House Committees advocating the passage of the bill.
- (5) The expressed intent of the legislators during debate on the bill.
- (6) The elementary canon of statutory construction which requires the Court to interpret so that no words or phrases are rendered superfluous.

(g) Limited Jurisdiction of Federal Courts

The jurisdiction of a Federal Court being limited, and not general, the presumption is again jurisdiction, unless it affirmatively appears. Jurisdiction cannot be presumed or inferred. *Hanford v. Davies*, 163 U.S. 273, 279, 16 S. Ct. 1051, 41 L. Ed. 157, (1896); *Metcalf v. Watertown*, 128 U.S. 586, 9 S. Ct. 173, 32 L. Ed. 543, (1888); *Smith v. McCullough*, 270 U.S. 456, 46 S. Ct.

338, 70 L. Ed. 682 (1926) ; *Norton v. Sarney*, 266 U.S. 511, 515, 45 S. Ct. 145, 69 L. Ed. 413 (1925). The burden of establishing the jurisdiction of the Federal court is throughout the case, and at all times, on the plaintiff, and this burden never shifts. *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (1936) ; *KVOS v. Associated Press*, 299 U.S. 269, 57 S. Ct. 197, 81 L. Ed. 183 (1936). These rules apply to jurisdiction of the subject-matter as well as to other aspects of Federal jurisdiction. *United States v. Griffin*, 303 U.S. 226, 58 S. Ct. 601, 82 L. Ed. 764 (1938) ; *United States v. Corrick*, 298 U.S. 435, 440, 56 S. Ct. 829, 80 L. Ed. 1263 (1936). This question may even be raised by a Federal court or by the Supreme Court, on its own motion. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 59 S. Ct. 744, 83 L. Ed. 1001 (1939) ; *Rorick v. Board of Commissioners*, 307 U.S. 208, 59 S. Ct. 808, 83 L. Ed. 1242 (1939).

Manifestly, unless the jurisdiction of a Federal court is clear, and without substantial doubt, it should not be taken. This is especially so where, as here, an appropriate forum exists in which there is undoubted jurisdiction.

We respectfully submit that this court is clearly without jurisdiction of the subject-matter of this action.

The Securities Exchange Act of 1934 Does Not Provide a Civil Right of Action Under Section 10 (b).

Appellees are aware of the fact that several district courts, following the lead of the court in the case of *Kardon v. National Gypsum Co.*, (E. D. Pa.), 69 F. Supp. 512, have held to the contrary. These, being cases in district courts, are not binding upon this court. The Court of Appeals for the Ninth Circuit has not yet passed upon this question.

Appellees frankly concede that the Second Circuit in *Fischman v. Raytheon Mfg. Co.*, 188 F. (2d) 783, 787, ruled adversely to our contention, in the following language:

“Section 10 (b) ,to be sure, does not explicitly authorize a civil remedy. Since, however, it does make ‘unlawful’ the conduct it describes, it creates such a remedy.”

It is thus apparent, from the foregoing quotation, that none of the contentions which we are making here were passed upon by the Court.

The cases of *Osborne v. Mallory*, D.C. S.D. N.Y., 86 F. Supp. 869, and *Slavin v. Germantown Fire Insurance Company*, 3 Cir., 174 F. 2d 799, 805, are not persuasive.

In the *Slavin* case the defendants did not dispute the failure of the Act to specifically permit private litigation for violation of Section 10 (b).

Prior to the *Kardon* case, commentators in discussing the Securities and Exchange Act of 1934, had noted that although several other sections of the Act

expressly provided for similar remedies that Section 10 did not, and had questioned, therefore, whether Section 10 could give rise to a civil action for the benefit of private parties.

“However, since other sections of the Act specifically grant remedies to persons injured by violations of their terms, the inference is strong that the omission of such a provision in Section 10 (b) indicates a congressional intent that parties injured by its infringement should be left to their common-law remedies.”

59 Harv. L. Rev. 769, 779.

In the *Kardon* case it was held that even though Section 10 of the Act provides no civil remedy, a remedy would be implied under the general rule that a violation of the criminal statute may give rise to a civil remedy. As an abstract proposition, that is sound law and would be persuasive if no other section of the Act provided specifically for a civil remedy. But here we are dealing with an Act carefully drawn, penal in character, with a number of specific sections, spelling out civil liability and providing a specific Statute of Limitations. These sections are as follows:

Section 9 (U.S.C.A. Section 78i (e)) ;
 Section 16 (15 U.S.C.A. Section 78p (b)) ;
 Section 18 (15 U.S.C.A. Section 78r) ;
 Section 29 (15 U.S.C.A. Section 78 cc (b)) .

Thus, in four other sections of the Act, a civil remedy is specifically provided. If Congress intended that a violation of Section 10 should give rise to civil reme-

dies, it is unbelievable that it would not have specifically so provided when in four other sections (above quoted) the Act specifies provision for civil remedies.

We submit that the clearest expression of legislative intent in these instances is the specific omission of a provision for civil remedy in Section 10 when it is specifically provided for in four other sections of the Act.

Section 9 of the Act (15 U.S.C.A., Section 78i) is nearly identical with Section 10 except that Section 9 specifically provides a civil remedy. It seems incredible that Congress, in enacting two successive sections of the Act dealing with prohibited practices, would place a specific section relating to civil remedies in Section 9 and not likewise rewrite it into the next succeeding section, Section 10, if such had been the Congressional intent.

The construction for which we are contending of Section 10 does not mean that that section becomes meaningless because violations of the section subject a person to the injunctive remedies provided for in Section 21, (15 U.S.C.A., Section 78 (u)) and would also subject a violator to the penalties provided for in Section 32 of the Act, (15 U.S.C.A., Section 78ff.) Moreover, insofar as civil remedies are concerned, any person claiming to have been injured by practices which violate Section 10 and Rule X-10-B-5 can bring his common law action for deceit in the appropriate court.

In conclusion, we submit that the only rational approach is that Congress, in enacting the Securities Exchange Act of 1934, so carefully drawn and so carefully considered, provided for civil remedies where Congress intended that they should exist and did not provide for them where the intent was that a violation of that particular section of the Act should not give rise to a civil action.

The Complaint Does Not Allege Sufficient Use of the Mails to Confer Federal Jurisdiction Under Section 10 of the Securities and Exchange Act.

Paragraph V of the complaint (Tr. 6) alleges certain acts "by the use of the mails" and other means of interstate commerce "at times hereinafter set forth." Further along in the complaint is Paragraph XV (Tr. 16), which is the "hereafter" paragraph referred to containing only the single allegation that the mails were used when a letter was sent by an Everett bank, at defendants' request, directed to a bank in Seattle, authorizing the latter bank to credit plaintiff's account. Thus there is presented the single question of whether the use of the mails as alleged in Paragraph XV is sufficient to confer Federal jurisdiction under Section 10 (b) of the act.

In *Kemper v. Lohnes*, (C.C.A. 7, 1949) 173 Fed. 2d 44, the complaint alleged that plaintiff read an ad-

vertisement in a newspaper offering stock for sale, wrote a letter to defendant evidencing interest, received a letter suggesting an appointment and subsequently purchased stock upon misrepresentations. Action was commenced under Section 12 of the Securities and Exchange Act of 1933 (15 U.S.C.A. 771). It was held that inasmuch as the mails were not used for the making of any untrue statements that Federal jurisdiction was not conferred.

The court in the *Kemper* case, *supra*, refused to follow the reasoning or the holding in an earlier case of *Schillner v. H. Vaughan Clark and Co.*, (C.C.A.2d) 134 Fed. 2d 875, a case under the same act, where it was held that the delivery of stock certificates by mail was a part of the sale and sufficient to invoke Federal jurisdiction.

The answer to our specific question lies in the language of Section 10 (b) of the act itself, which section may be reduced for the purpose of our immediate inquiry, as follows:

“It shall be unlawful . . . directly or indirectly . . . , by the use . . . of the mails, . . . to use or employ, ...any manipulative or deceptive device . . .”

Rule X-10b-5 can similarly be reduced as it contains identical language. It seems clear that the sending of the letter as alleged in Paragraph XV of the complaint does not bring appellant within the purview or scope of the statute or the rule because it is not alleged that

the mails were used for any manipulative or deceptive device.

The cases cited on page 37 of appellant's brief, with the exception of the *Slavin* case, to appellees' knowledge, involved different statutes containing different language and are not controlling here. *Slavin v. Germantown Fire Insurance Co.* (C.C.A. 3rd 1948) 174 F. 2d 799, did involve Section 10 (b) of the act but its controlling force is lost inasmuch as on page 801 of the opinion it is said that defendants conceded that there was such a use of the mails as to confer jurisdiction.

The Cause of Action Is Barred by the Statute of Limitations.

There being no statute of limitations provided in the Securities Exchange Act of 1934 relating to actions arising out of Section 10 (assuming that they can arise), the applicable statute would be that of the forum, or in this case, the State of Washington. *Osborne v. Mallory*, D.C. S.D. N.Y., 86 F. Supp. 869, 879.

Before considering the applicable statute of limitations in the State of Washington it is necessary to consider what type of action is involved. The appellant undoubtedly would concede that it is an action based upon a statute, namely, the Securities Exchange Act of 1934 and Section 10 thereof. Otherwise they are not

properly in this court, there being no diversity of citizenship.

A cause of action arising under Section 10 of the Securities Exchange Act of 1934 (15 U.S.C.A., § 78 (a) et seq.) is a cause of action arising out of a statute. *Osborne v. Mallory*, *supra*, 86 F. Supp. 869, 879; *Hall v. American Cone & Pretzel Co.*, D.C. E.D. Pa., 71 F. Supp. 266, 269; *Acker v. Shulte*, D.C. S.D. N.Y., 74 F. Supp. 683, 688; *Frye v. Schumaker*, D.C. E.D. Pa., 83 F. Supp. 476, 478; *Rosenberg v. Hano*, 3 Cir. 121 F. 2d 818, 820; *Pennsylvania Company for Insurances, etc. v. Dackert*, 3 Cir., 123 F. 2d 979, 985.

The cause of action, if any, accrued, under the allegation of the complaint, with the use of the mails in September, 1945, in connection with the alleged fraudulent purchase of stock from the plaintiff. In *Osborne v. Mallory*, 86 F. Supp. 869, 873-874 (D.C. N.Y. 1949) it was held:

“In the case at bar the violation took place when inter-state facilities were used by the defendants in connection with the sales made to the various plaintiffs, etc.”

The complaint in this case was filed on April 19, 1951, more than five (5) years subsequent to the time the cause of action, as alleged in the complaint, accrued.

Remembering, then, that this is a cause of action based upon a statute, the applicable statute of limi-

tations in the State of Washington is two (2) years. The statute in question reads as follows:

“An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.”

Rem. Rev. Stat. § 165.

The Supreme Court of the State of Washington, in interpreting the above statute, has held many times that this is the section which applies to actions to recover on a liability created by statute.

Thomas v. Richter, 88 Wash. 451, 153 Pac. 333; *Douglas County v. Grant County*, 98 Wash. 355, 167 Pac. 928; *Robinson v. Lewis County*, 141 Wash. 642, 252 Pac. 143, 256 Pac. 503; *Noble v. Martin*, 191 Wash. 39, 70 P. 2d 1064; *Heitfeld v. Benevolent and Protective Order of Keglers*, 136 Wash Dec. 637, 220 P. 2d 655.

The court of appeals for this circuit, in a case brought to recover overtime pay and damages under the Fair Labor Standards Act, 29 U.S.C.A., § 201, et seq., recognized that under the law of the State of Washington the applicable statute of limitations on a liability arising out of a statute was two (2) years. *Lassiter v. Guy F. Atkinson Company*, 9 Cir., 162 F. 2d 774.

This action not having been commenced within two (2) years after the alleged cause of action accrued, should be dismissed.

Even assuming that the statute commences when the alleged fraud is discovered it still is that the action is barred under the two (2) year statute. The complaint alleges the fraud was discovered subsequent to January, 1945. Therefore, it was known prior to January 31, 1945. The complaint was filed April 19, 1951, more than two (2) years later.

If appellant takes the position that this is not a statutory action in order to avail herself of the three (3) year statute she is out of court for lack of jurisdiction. If appellant maintains that the action is based purely upon a Federal statute (SEC Act.) in order to avail herself of Federal jurisdiction then the two (2) year statute is applicable and her action is barred.

CONCLUSION

It is submitted that the judgment of dismissal should be affirmed.

Respectfully submitted,

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APPENDIX "A"

Statements of Senators and Congressmen as to the Intent of the Securities and Exchange Act of 1934.

The following are excerpts from the Senate and House Committee Reports on the Securities and Exchange Act:

"In addition to the organized security markets there exist in financial centers unorganized 'over-the-counter' markets where securities are bought and sold in large volume. Many of these securities are of a conservative character, such as Government, State and Municipal bonds which are exempted from the provisions of the bill; but others are more speculative in nature and are subject to the abuses of manipulation. For example, the Committee has heard of extensive manipulation in certain New York bank stocks after their withdrawal from the New York Stock Exchange and while they were being sold 'over the counter.' These manipulations resulted in tremendous losses to the investing public, and in enormous profits to insiders. It has been deemed advisable to authorize the Commission to subject such activities to regulations similar to that prescribed for transactions on organized exchanges. This power is vitally necessary to forestall widespread evasion of stock exchange regulation by the withdrawal of securities from listing on exchanges, and by transferring trading therein to 'over-the-counter' markets where manipulative evils could continue to flourish, unchecked by any regulatory authority. Since the necessity for regulation of 'over-the-counter' markets will depend largely on the extent to which activities prohibited on exchanges are transferred

to such markets, provision for their regulation has been made as flexible as possible." (Senate Report No. 792, p. 6, 73d Cong. 2d Sess.)

and in House Report No. 1383, the following is stated:

"REASON FOR CONTROL OF OVER-THE-COUNTER MARKETS.—The Committee has been convinced that effective regulation of the exchanges requires as a corollary a measure of control over the 'over-the-counter' markets. The problem is clearly put in the recent report of the Twentieth Century Fund on 'stock market control':

"The benefits that would accrue as the result of raising the standards of security exchanges might be nullified if the over-the-counter markets were left unregulated and uncontrolled. They are of vast proportions and they would serve as a refuge for any business that might seek to escape the discipline of the exchanges; and the more exacting that discipline, the greater the temptation to escape it. Over-the-counter markets offer facilities that are useful under certain conditions, but they should not be permitted to expand beyond their proper sphere and compete with the exchanges for business that, from the view of the public interest, should be confined to the organized markets. *This constitutes the sanction for federal regulation of over-the-counter dealers and brokers.* To leave the over-the-counter markets out of a regulatory system would be to destroy the effects of regulating the organized exchanges." (House Report No. 1383, P. 15, 16, 73d Cong. 2d Sess.) (Emphasis supplied).

Mr. Maloney said:

"If one wants to put effective restraints upon

excessive speculation on the exchanges, it is obviously necessary to guard against the same sort of excessive speculation on the unregulated markets. But those who tell you that the over-the-counter provisions of the bill will interfere directly with the small industrial concern are either wilfully misleading you or are ignorant of what the bill really does. *The control of the Commission with respect to the over-the-counter markets may be exercised only over dealers or brokers who maintain a public market.* The Commission has no power to cause any corporation to file any statement or to subject itself in any way to regulation. Even the dealer or broker is not subject to control if he does no more than to try to find a buyer for a person who wants to sell some shares or to find a seller for a person who wants to buy some shares. *A dealer or broker creates or maintains an over-the-counter market as it is defined in the bill only if he stands ready both to buy and sell; that is, if he stands ready to quote you a price at which he will buy your shares as well as a price at which he will sell your shares.*" (78 Cong. Record, p. 7868). (Emphasis supplied).

"This bill is primarily designed to prevent a manipulation of securities—the kind of manipulation that threatened the lives of the insurance companies of America, and thereby the humble estates men endeavored to create by the sweat of the brow and real self sacrifice. It would remove a chance at manipulation that not only threatened the banking system of the country but actually left many banks broken wreckage upon the rocks. It would forever forbid a manipulation that boiled a market to the point where it attracted credit away from the proper channels of industry into uncertain paths of speculation." (Ibid p. 7869).

Mr. Mapes, a member of the House Committee on Interstate and Foreign Commerce, stated at page 7711 of the Record:

“And the only provision in the bill that relates to small or local corporations in that respect, as I understand it, is the one in the over-the-counter market section, which gives the . . . Commission authority in its regulations of dealers and brokers in the over-the-counter markets to require that such dealers and brokers cease to handle the securities of any corporation unless they are listed with them, but in no case is a corporation required to so list unless it sees fit to do so.”

And Mr. Steiwer stated at page 8189:

“I merely want to make a suggestion. Is it not appropriate, in order to calm the fears of those who now raise the question as to the inclusion of small intrastate corporations, to say to them that the bill by its term does not and cannot reach such corporations. In the first place, *this bill deals with stock exchanges, and with the regulation of the over-the-counter market.* The very least corporation, if it should seek to list its stock upon the stock exchange, would be obliged to comply with this proposed law. That might be so even though it were an intrastate institution, because the stock exchange may be engaged in an interstate business and the intrastate operation comes in quite incidentally.

I think, therefore, the very least corporation might subject itself to regulation under this proposed act if it should seek to sell its securities over the counter. *But unless the stock crosses the threshold of one of these institutions or the other,*

it is not affected by the proposed law, whether it be a big institution or a little institution." (Emphasis supplied). (78 Cong. Rec. 8189).

Note: The stock of the Robinson manufacturing Company never at any time crossed the threshold of one of these institutions or the other.

APPENDIX "B"

1. Over-the-Counter Markets—Defined by Securities and Exchange Commission and Text Writers.

Mr. Louis Loss, Associate General Counsel of the Securities and Exchange Commission, (formerly Chief Counsel of Trading and Exchange Division), who gave a course at the Yale Law School on "Regulation of Securities and Security Markets" distributed mimeographed material entitled "Cases and Materials on SEC Aspects of Corporate Finance." (Philadelphia, May 1947). On page 119 appeared the following:

"The over-the-counter markets, in general, are the unorganized markets in which there are meetings of individual supply and demand as contrasted with the organized markets or exchanges where there are meetings of collective supply and demand. Over-the-counter transactions take place in the offices of brokers and dealers and do not involve the trading facilities of an exchange."

Quotations from other writers and texts are given to show what an "over-the-counter" market is:

"Over the Counter. Securities sold by brokerage

or bond houses direct to customers are sold 'over-the-counter'." The Stock Market, (1941), Dice. (Professor Business Organization, Ohio State Univ.)"

"Over-the-Counter Market. The over-the-counter market is an equally essential part (together with the exchanges) of the securities markets. It provides facilities for the distribution of new issues among investors and for trading in outstanding issues. The securities traded may be classed as (a) those traded exclusively over-the-counter and (b) those traded both on an exchange and over-the-counter . . ."

"Dealers. The market in over-the-counter securities is made by dealers within and between their offices at prices established by individual negotiation; that is, through bid and offer prices. Dealers 'create' and 'maintain' markets in the securities. A dealer creates a market for a security when he is prepared both to buy and sell that security at the prices he quotes. He maintains such a market when he continues over a period to quote the prices at which he is ready both to buy and sell. . . ." Investment Analysis, (Prime) (Professor of Finance, N. Y. Univ.) 1946.

John C. Loeser, of National Quotation Bureau, Inc., has published a book entitled, *"The Over-the-Counter Securities Market—What it is and How it Operates."* In Chapter I, entitled, "The Over-the-Counter Market—What it is," the author states that dealers in investment securities

"create and maintain a market for securities separate and apart from those maintained on the

floors of the securities exchanges and the volume of purchases and sales of securities that they transact in this market in the course of a year is estimated in billions of dollars. Such is the importance in the nation's financial and economic organization of the financial houses—some 6,700 of them with about 2,300 branch offices throughout the country—that create and maintain what has come to be known as the over-the-counter market for securities.”

At pages 6-8 the author explains the origin of the term “over-the-counter” as follows:

“ORIGIN OF THE TERM ‘OVER THE COUNTER’

“The dealer in securities has played an outstanding role in the financial and economic development of the United States. There have always been commercial or financial houses of one kind or another that have acted as dealers in bonds and stocks. The first bonds issued by the Federal government and the shares in the early banks, insurance companies and other corporations were dealt in by the early merchant houses and state-chartered banks of the post-Revolution period.

“The term ‘over the counter,’ however, does not appear to have originated or come into general use until a century or so ago. Investors of that period were accustomed to make their purchases and sales of investment securities through the private banking houses which, as one of their regular activities, engaged in the business of buying and selling United States government, municipal and corporate bonds as dealers.

“In their interior appearance, these houses were

not unlike small commercial banks of today. There were counters such as are found in modern banking institutions and over these, investors directly bought from and sold to the houses. It was over these counters that they actually paid for and accepted delivery of the securities they bought and delivered and accepted payment for the securities they sold. Hence, purchases and sales transacted by these dealer institutions came to be known as transactions 'over the counters' to distinguish them from those effected by public auction of the 'stock and exchange boards' as exchanges were then called. The present securities houses and banks that act as dealers are the successors to the trading function of the earlier private bankers and the market which they create and maintain separate and apart from the exchanges has thus become known as the over-the-counter market.

"Fundamentally there is little essential difference in the manner in which investors of a century ago transacted business with the private bankers and those of the present do business with today's over-the-counter dealers. Just as investors bought and sold securities over the counters of the private banking houses, so today such investors as the banks, insurance companies and other institutions as well as individuals, approach the over-the-counter dealers and directly buy securities from them and sell securities to them."

This above referred to book was published in 1940 by National Quotation Bureau, Inc., with offices in New York, Chicago, and San Francisco.

In "*The Modern Corporation and Private Property*,"

by Berle and Means, an "over-the-counter market" is defined as follows (pp. 290-2) :

"Security markets are of all gradations, though the underlying idea is always the same. . . .

"At the lowest end of the scale are the so-called 'private' or 'made' markets. They are maintained by a single investment banking house which constantly draws in buyers and sellers. These commonly exist in respect of some one security only, the familiar phrase being that 'the market for the security is "made" by' such and such a house. Where a security is not listed on an Exchange, it is frequently sold under some kind of promise of liquidity; the investment banking house sponsoring the issue will usually undertake this responsibility for a time at least.

"The combination of a great number of such situations gives rise to what is known as an 'over the counter' market."

This book was published by The McMillan Company, New York (1933).

In "*The Security Markets*," published by Twentieth Century Fund, Inc., New York (1935), the nature of the over-the-counter markets and the manner of their operation is described as follows (pp. 263-6) :

"a. Nature of the Over the-Counter Markets.

"The over-the-counter markets are private markets for securities in which dealings are not conducted on organized exchanges, or for which the organized exchanges do not at present provide the

most desirable trading facilities. There is no public meeting of supply and demand in these markets. Instead, the supply, at any given moment, must seek a corresponding demand or the demand must seek a corresponding supply. The public meeting of supply and demand on the organized exchanges is evidenced by the concentration of the brokers on the floor of the Exchange, their open bidding and offering of securities, and their knowledge, and that of the public generally, of the prices and amounts at which transactions take place. The private character of these unorganized markets is evidenced by the absence of these circumstances. A transaction in the over-the-counter markets is known only to the particular customer and dealer involved. The dealer buys a given security from one customer and sells it to another, and neither of the two customers, nor their brokers, knows of the other's transaction. There is no public record of the transaction, and no ticker or quotation service."

"c. How the Over-the-Counter Market Operates.

"Over-the-counter transactions in stock are ordinarily conducted about as follows: Dealer Blank, having an order to buy 100 shares of Third National Bank stock for a customer, may call Dealer Doe and ask him for the market in that stock. Dealer Doe replies 113-115, meaning that he will buy at 113 and sell at 115, though usually without at the time indicating the size of the market. The 2 point difference represents the profit Dealer Doe expects to make on deals in that stock, though his expectation may not be fulfilled. Dealer Blank may accept, may ask for a better price or may go to another dealer. Dealer Blank may have

several competing brokers on the wire at one time, and get the best prices of each. After purchasing the stock, Dealer Blank notifies his customer, 'I have sold to you 100 shares of Third National Bank stock.' In the case of a selling order, the same routine would be followed, except that Dealer Blank would find a purchaser for the stock and would notify the customer, 'I have bought from you 100 shares of Third National Bank stock.' In both cases Dealer Blank is a principal twice; that is, he both buys and sells for his own account. He seldom charges a commission for his services, but gets a profit from the difference between his buying and selling prices. This difference will vary according to his judgment of how good a buy he has made, how valuable a customer this particular individual or company is, how much difficulty he had in filling the order and, above all, how much the traffic will bear—that is, how big a spread can be obtained between the purchase and sale prices."

The authoritative nature of the above publication is evidenced by the fact that in H. R. Rep. No. 1383, recommending the adoption of the Securities Act of 1934, reference is twice made (pp. 10, 16) to "*The Security Markets*."

Apparently at the time when the House report was rendered, "*The Security Markets*" had not been published but was in the course of preparation.

In "*The Securities Exchange Act of 1934, Analyzed and Explained*," by Charles H. Meyer, the author in discussing Section 15 of the Act, dealing with over-the-counter markets, says (pp. 106-7) :

“What constitutes an over-the-counter market:

“Not every transaction in a security off an exchange is subject to regulation under this section, but only transactions on over-the-counter markets. It is therefore important to determine what is an over-the-counter market. Such a market may be maintained by a single broker or dealer, or by a number of them. It is a market which provides facilities for *both the purchase and the sale of a security*. A broker who stands ready either to buy or to sell or to quote the price at which he will buy or sell conducts such a market. (*Italics in text*).

“What is not an over-the-counter market—

“The negotiation by a broker or dealer of a single sale or purchase, no matter how large, is not affected by over-the-counter regulations. Only ‘markets’ are regulated and not single transactions.

“Purchases and sales by individuals who are neither brokers nor dealers do not constitute an over-the-counter market. Stockholders in corporations, whether small or large, are free to acquire and dispose of their securities themselves, unfettered by Federal regulations.”

This book is published by Francis Emory Fitch, Inc., Financial Publishers, 138 Pearl Street, New York. Mr. Meyer is a member of the New York bar and is the author of “*The Law of Stockbrokers and Stock Exchanges*” and “*Legal Pitfalls of the Stock Brokerage Business and How They May Be Avoided.*” His writings have been referred to authoritatively by the SEC

in *In the Matter of Barrett & Company*, 9 SEC 319, 328 (1941).

To the same effect see "Manipulation of Over-the-Counter Securities Markets," 10 *George Washington Law Review* 639, (Footnote 2), (1942) and "Regulation of Stock Market Manipulation," 56 *Yale Law Journal* 509, 530 (1947).

In the Matter of Barrett N Co., supra, the Commission said (p. 323) :

"The over-the-counter market differs from that that of the exchange market in that transactions are not reported; quotations for a particular security are published only by those dealers who are interested in the security and who make an over-the-counter market for it. Frequently, a dealer publishes two sets of quotations, an 'inside' market at which he indicates interest in buying from or selling to other dealers, and an 'outside' market, within the range of which he indicates an interest in buying from or selling to a member of the public. The 'inside' prices are published daily in quotation sheets, the largest and most important of which is circulated by National Quotation Service, Inc. The Eastern sheets are received by subscribers in New York and Boston the morning following the date of publication. The 'inside' prices published in these sheets are prices furnished by the various firms shortly after noon on the date of publication. While the practice is not invariable, 'outside' prices usually are also quoted through various media, depending upon the nature of the security. Large issues of securities that are widely held or in which there is a widespread interest are usually quoted weekly in financial pe-

riodicals and daily in the large metropolitan newspapers, whereas the smaller issues, when they are quoted, are usually included daily or weekly in newspapers of general circulation in those particular areas in which ownership of the security is concentrated.

* * * * *

“While neither ‘inside’ nor ‘outside’ quotations are necessarily firm offers to buy and sell, and while actual bids and offers on the day following publication of such quotations may vary slightly from the quoted ‘inside’ or ‘outside’ prices, the published quotations, nevertheless, constitute the reported market held forth to the public and to dealers.”

In footnote 22 of the brief of *Amicus Curiae* at pages 39 and 40 (typewritten draft) and also footnote 11, page 830 in the case of *Speed v. Trans-America Corp.*, *supra*, are brief quotations from two writers, which, taken by themselves, would perhaps support the contention made by the Commission that an isolated sale on a doorstep is a part of the over-the-counter market. However, when the whole of the section, in which these quotations appear, is read, it becomes obvious that the writers are also discussing a market maintained by brokers and dealers off a registered exchange. So that this Court will not be misled by these partial quotations we set them forth below in full:

“First of all, what is meant by the over-the-counter market? Briefly, this market embraces

all transactions in securities not made on stock exchanges. In size and diversity of issues dealt in, it is far greater than all the nation's stock exchanges. The underwriting and distribution of new corporate issues are accomplished through the mechanism of the over-the-counter market. Today, practically all the buying and selling of government, state and municipal bonds and a majority of the transactions in corporate bonds is over the counter. Activity in preferred stocks and various specialized types of common shares and investment trust units is also largely over the counter. Only in the common stocks and perhaps the most speculative types of preferred stocks and bonds do stock exchange volume exceed those of over the counter. Although it deals in listed as well as unlisted securities, the predominant concern of the over-the-counter market is with new issues and the obtaining of capital necessary for private enterprises to develop and expand."

Fundamentals of Investment Banking, Sec. 8, p. 42 (Investment Bankers Association, of America, 1947) : (Entire paragraph).

"The market for securities not listed on any regularly organized exchange. More stocks and bonds are represented by such markets than on the stock exchanges. Frequently, large blocks of bonds and stocks, represented on stock exchanges, are dealt with on such outside markets, one of the functions of the over-the-counter markets being to effectuate redistribution of securities not previously digested. For example, United States Government issues, though listed, are frequently bought and sold in large blocks over the counter. Practically all dealings in state and municipal bonds are upon over-the-counter markets, which also command almost exclusive dealings in bank,

insurance and investment trust shares as well as real estate bonds.

Over-the-counter markets in the United States, though lacking in volume and interest, actually exceed the number of listings on the organized exchanges. As of the middle of 1935, a careful estimate disclosed that quotations are available, on not less than 25,000 unlisted bonds and 30,000 unlisted stocks or fully 55,000 separate over-the-counter securities throughout the United States. By contrast, listings on registered stock exchanges totalled about 7,000, of which about 2,300 were on the New York Stock Exchange." (The Article continues in the same vein.) *Over-the-counter Market*, Munn, Encyclopedia of Banking and Finance (1937), p. 613. (Entire Paragraph and succeeding Paragraph).

APPENDIX "C"

Article Appearing in 64 Harvard Law Review 1018.

"SECURITIES ACTS—FEDERAL SECURITIES EXCHANGE ACT — FRAUDULENT PURCHASE OF NON-REGISTERED SHARES OF CLOSELY-HELD CORPORATIONS IS VIOLATION OF SECTION 10 (b).—Plaintiffs had sold their minority interest in a closely held corporation to the defendants, majority shareholders, who were also officers and directors of the corporation to the defendants, majority shareholders, who were also officers and directors of the corporation. Alleging that due to defendants' fraudulent representations made through the mails the price was less than the actual value of the shares, plaintiffs sought damages under SEC Rule X-10B-5, 17 Code Fed. Regs. Section 240.10b-5

(1949), which prohibits the use of the mails, or of other instrumentalities of interstate commerce, or of any facility of a national securities exchange, by any person, to deceive or mislead in connection with the purchase or sale of any security. Defendants moved to dismiss the complaint contending that Section 10(b) of the Securities Exchange Act 48 Stat. 891 (1934) 15 U.S.C. Section 78j (b) (1946), under which the rule was promulgated, is not applicable where, as here, the shares are not registered on a national securities exchange, nor regularly traded over the counter by dealers or brokers. *Held*, that since Section 10(b), by its terms, applies where shares are " . . . registered . . . or not so registered. . . ." the transaction was clearly within the section. Motion denied. *Robinson v. Difford*, 92 F. Supp. 145 (E. D. Pa. 1950).

"This is the first explicit judicial determination that the fraud provisions of Section 10 (b) may be invoked even though the unregistered securities were not of an issue regularly traded. See Brief for Defendant (Slavin), p. 11, *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). That Section 10 (b) was intended to afford protection against transactions involving such securities is questionable.

Section 2, declaring that security transactions are affected with a national public interest, making control and regulation necessary, mentions only transactions conducted upon exchanges and over-the-counter markets; and though no part of the legislative history refers to Section 10 (b) with particularity, the debates on other provisions of the Act seem to indicate that Congress intended only to regulate and affect dealings in registered securities and unregistered securities trad-

ed over the counter, 78 Cong. Rec. 8190 (1934). The plaintiffs, and the SEC, (Brief for SEC as Amicus Curiae, pp. 7-10) urged that the over-the-counter market embraces all transactions in unregistered securities. The terms of Rule X-10B-5 also reflects this broad interpretation. However, common business understanding, see Munn, Encyclopedia of Banking and Finance 613 (1937), discussions in Congress when enacting the statute, 78 Cong. Rec. 8190 (1934), and the provisions of Section 15, providing for the regulation of brokers and dealers trading over the counter, as originally written 48 STAT. 895 (1934), indicate that such a market does not exist unless brokers or dealers regularly deal in the issue. But cf. H. R. Rep. No. 2307, 75th Cong., 3d Sess. 2, 3, 5 (1938) (conflicting statements as to coverage intended by over-the-counter regulation of brokers and dealers under Section 15 as originally enacted).

“Since isolated transactions in securities of closely held corporations do not seem to be affected with a substantial national public interest, at least as determined by Congress in Section 2, it appears unlikely that Congress intended the statute to be applicable to dealings of this character, especially in view of the substantial criminal liabilities imposed for violation of the Act. And whatever doubt may remain concerning the intended scope of the Act should not necessarily be resolved in favor of the SEC’s interpretation in Rule X-10B-5, since the eight-year delay before promulgation may be an indication of the Commission’s doubt as to the validity of its interpretation. Cf. *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

“Limiting the coverage of the Act to transactions in registered or regularly traded securities would not deprive Section 10(b)’s reference to unregistered securities of substantial meaning. Where, for example, a person who is not a broker or dealer engages in deceptive practices in connection with the purchase of a nonregistered security, which issue is regularly traded by brokers or dealers over the counter, only Section 10(b) constitutes a basis for recovery under either the Securities Act of 1933, 48 STAT. 74 (1933), 15 U.S.C. Section 77a-77aa (1946). Although a plaintiff cannot avail himself of the nation-wide service of process and liberal venue provisions of the Act, Securities Exchange Act Section 27, 48 STAT. 902 (1934), as amended 49 STAT. 1921 (1936), 15 U.S.C. Section 78aa (1946), in cases excluded by the suggested interpretation, he is not deprived of all remedies. Resort may still be had to state law, and most states impose the same obligation of fair dealing, at least on “insiders,” as does the Act. e.g., *Hotchkiss v. Fischer*, 136 Kan. 530, 16 P. (2d) 531 (1932). But cf. *Goodwin v. Agassiz*, 283 Mass. 358, 186 N. E. 659 (1933). Further, although Rule X-10B-5 literally imposes the same standard on “noninsiders” as on “insiders,” it seems unlikely as a practical matter that the Federal courts will hold “noninsiders,” who by definition have no ready access to confidential information, to a higher degree of responsibility than do the courts under existing state law. See Note, 59 Yale L.J. 1156 (1950).”

No. 13111

**In the United States Court of Appeals
for the Ninth Circuit**

IDALIA O. FRATT, APPELLANT

v.

**JOHN R. ROBINSON AND JANE DOE ROBINSON, HUSBAND
AND WIFE, ET AL., APPELLEES**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION**

**BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE**

LOUIS LOSS,
Associate General Counsel,

ALEXANDER COHEN,
Special Counsel,

*Securities and Exchange Commission,
425 Second Street N. W., Washington 25, D. C.*

FILED

DEC 31 1951

**PAUL P. O'BRIEN
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 13111

IDALIA O. FRATT, APPELLANT

v.

JOHN R. ROBINSON AND JANE DOE ROBINSON, HUSBAND
AND WIFE, ET AL., APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION*

**BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE**

JURISDICTION

This is an appeal from a portion of an order entered on August 6, 1951, by United States District Judge J. Frank McLaughlin, sitting by assignment in the United States District Court for the Western District of Washington, Northern Division (Tr.¹ 42). In that portion Judge McLaughlin dismissed plaintiff's action for lack of jurisdiction of the subject matter (Tr. 40-41). This is discussed more fully in the Statement of the Case below.

Plaintiff based her action on defendants' alleged violation of Rule X-10B-5,² promulgated by the Se-

¹ Transcript of Record.

² 17 C. F. R. § 240.10b-5.

curities and Exchange Commission (hereinafter called the "Commission") pursuant to Section 10 (b) of the Securities Exchange Act of 1934³ (frequently referred to as the "Act" or "1934 Act" hereinafter) (Tr. 4-6). Section 27 of the 1934 Act⁴ vests the United States district courts with jurisdiction of such actions.

This Court has jurisdiction to review the order below under Section 27 of the 1934 Act, and Title 28, U. S. Code, § 1291.

STATEMENT OF THE CASE

1. Questions involved

The only question which appellant presents is the propriety of the ruling below dismissing her complaint, which charges defendants with a fraudulent purchase of her stock involving the use of the mails allegedly in violation of Rule X-10B-5, for the sole reason that the complaint failed to allege that the stock had been traded on a securities exchange or in the "over-the-counter" market by brokers or dealers.

Three other questions involving the proper interpretation of the Securities Exchange Act of 1934 were argued in the court below on defendants' motions to dismiss. Since it is probable that appellees will also present argument with respect to these questions in an effort to sustain the ruling below on alternative grounds if necessary, we shall also present in this brief the Commission's views on

³ U. S. C. § 78j (b).

⁴ 15 U. S. C. § 78aa.

the latter questions. Our argument with regard to these questions, under the circumstances, will be considerably less detailed. Should appellees' briefs warrant further comment on our part, we shall do so in a reply brief. The remaining three questions are as follows:

(1) Were the uses of the mails which defendants allegedly made, or caused to be made, in connection with their purchase of plaintiff's securities, particularly mailings to effect payment for the securities and to obtain delivery of them, sufficient to provide jurisdiction under Rule X-10B-5?

(2) Does a violation of Rule X-10B-5 entitle a person who has been injured thereby to maintain a civil action for private recovery?

(3) What statute of limitations is applicable to a private action seeking damages for the violation of Rule X-10B-5?

2. Pleadings below

The following is a summary of the complaint (Tr. 4-24):

Plaintiff (the appellant), an elderly widow, is the former owner of 781.25 shares of the common stock⁵ of the Robinson Manufacturing Company (now known as the Robinson Plywood and Timber Company), a company incorporated and engaged in the lumber business in the State of Washington (Tr. 4, 7). The individual defendants (now appellees), with the exception of the Diffords and McGheis, were the majority stockholders,⁶ who constituted a "control

⁵ 7,500 shares were authorized and issued.

⁶ They held 5,000 shares.

group” actively managing the defendant corporation as officers, directors and controlling stockholders (Tr. 7-8). Plaintiff and her husband had owned their shares since 1901 (Tr. 7). She is inexperienced in business matters and never participated in the business (Tr. 7). Her husband, however, who was deceased at the time of the transaction in question, had been active in the business. After his death, plaintiff’s information concerning the business came from the defendant John R. Robinson, the company’s president, and other members of the control group with whom her husband had maintained close personal and business relationships while he was alive. To a large extent it was because of these past relationships that plaintiff placed complete trust and confidence in these people (Tr. 8-9). Some time prior to September 1945, however, these trusted individuals conceived and initiated a scheme to defraud minority stockholders into selling their shares to them at grossly inadequate prices (Tr. 9-10). Pursuant to this scheme, the defendant John R. Robinson, by making numerous misrepresentations to plaintiff and concealing material facts concerning the financial and business condition of the company, conditioned her mind for selling her stock. Contrariwise to the true facts, the prospects described by Robinson were quite dismal (Tr. 11-14). Plaintiff and the other minority stockholders had no representation on the board of directors, and she was not aware of the falsity of Robinson’s representations (Tr. 12-14). Thereafter, in September 1945, an agent of the control group—the defendant Samuel P. McGhei, who was an em-

ployee of the company—induced plaintiff to sell her stock ostensibly to him at \$64 per share, for a total of \$50,000 for the entire block, by misrepresenting that he was buying the stock for himself with his own money and that his purpose was to improve his chances for advancement in the company. Actually, McGhei bought for members of the control group, who furnished the purchase money and divided the stock thus acquired among themselves (Tr. 14–18).

Subsequently, in 1948, the control group, through another agent, the defendant W. E. Difford, further effectuated this scheme by inducing the other minority shareholders, likewise through fraudulent misrepresentations and concealment of material facts, to sell their shares to the control group at grossly inadequate prices. The other minority shareholders, however, were paid \$320 per share (Tr. 10, 18–22). Thereafter, the control group caused the articles of incorporation to be amended so as to change the name of the company, and to increase the authorized number of shares from 7,500 of \$100 par value each to 1,500,000 shares of \$1 par value each, or an increase of 66 for one. Thereupon the control group caused a registration statement to be filed with the Commission offering 271,025 shares of this stock for sale to the public. Plaintiff alleged that at least 216,546 of these shares represented stock of the former minority shareholders (Tr. 22). The registration statement was withdrawn when former minority shareholders, other than the plaintiff, instituted a lawsuit against members of the control group and W. E. Difford (Tr. 23). That lawsuit, filed in 1949 (and referred to later in this

brief), was compromised in 1950 pursuant to an arrangement whereby the former minority shareholders who brought that action obtained an additional \$110 per share, which brought their total receipts to \$430 per share, or nearly seven times what plaintiff was paid (Tr. 10-11).

Plaintiff claims that her stock was worth \$500 per share in 1945 at the time of the fraudulent purchase, and \$1,000 per share in 1949 when she discovered the facts, so that its total worth at the later date was \$781,250. Accordingly, she seeks \$731,250 in damages (Tr. 23-24). She avers that she did not discover the true facts until after January 1949, and that she could not have discovered them in the exercise of due diligence prior to that time (Tr. 6). She charges that defendants used the mails and facilities of interstate commerce in effectuating their fraudulent scheme, and bases her action on defendants' alleged violation of the antifraud provisions of the Commission's Rule X-10B-5 under the Securities Exchange Act of 1934 (Tr. 4-6, 17-18).

Defendants moved to dismiss the complaint on the following grounds:

(1) The transactions charged "did not involve a security traded in upon a securities exchange or upon an 'over-the-counter' market" and, therefore, were not subject to the Securities Exchange Act of 1934, which was alleged to be the basis for the court's jurisdiction (Tr. 25-26, 29, 32).

(2) The complaint did not allege that the mails, instruments of interstate commerce, or facilities of any national securities exchange, were used in connec-

tion with the fraud or deception allegedly effected by defendants upon the plaintiff in acquiring her stock (Tr. 26, 32).

(3) There is no private civil right of action under the Securities Exchange Act of 1934 for the transactions alleged (Tr. 26, 29, 32).

(4) The action was barred by the statute of limitations (Tr. 26, 30, 32).

Defendant W. E. Difford also moved to dismiss the complaint on the general ground that no claim had been stated as to him (Tr. 29). Defendants McLeods moved to dismiss on the additional ground that the complaint "fails to sufficiently allege these defendants' participation in or control over the acts and conduct complained of" (Tr. 33).

Motions to strike various allegations of the complaint as irrelevant and immaterial to the issues involved were also filed (Tr. 26-28, 30-31, 34-35). In addition, defendants McLeods filed a motion for a more definite statement (Tr. 33).

3. The Commission as *amicus curiae* below

Apprised of the pendency of this lawsuit, which involves the proper construction of a statute primarily administered by the Commission, the Commission sought and obtained leave of court to file a brief limited to an expression of its views on the questions of statutory interpretation (Tr. 35-37, 45).

In its brief, the Commission emphasized that it made "no independent assertions with respect to the facts" (p. 2). The Commission expressed disagreement with the first three of defendants' contentions.

With respect to the fourth—that relating to the statute of limitations—it expressed the view that the matter was governed by the law of the state of the forum. It did not undertake to argue any controverted issue of state law. Moreover, it expressed no opinion on the additional grounds urged in the motions to dismiss filed by defendants Diffords and McLeods for the reason that they involved mixed questions of fact and law involving problems which were not peculiar to the 1934 Act.

4. The order below

Judge McLaughlin's decision was handed down from the bench on July 31, 1951, immediately following the oral argument. He announced that he would dismiss the action because he did not believe the 1934 Act was applicable to transactions in a security which had not been traded on an exchange or in the over-the-counter market by brokers or dealers. A formal order to this effect was entered on August 6, 1951 (Tr. 40-41). In the August 6th order, however, Judge McLaughlin denied defendants' motions to dismiss to the extent that they were based on contentions that the 1934 Act does not provide a private right of civil action for the violation of Rule X-10B-5, and that the statute of limitations had run. Defendants' contention with respect to the sufficiency of the mailings was not ruled upon. Certain portions of defendants' motions to strike were granted and others denied (Tr. 38-41).

The exact language of the portion of the order appealed from is as follows:

It is Further Ordered, Adjudged and Decreed that the several motions of all the defendants to dismiss the action under Rule 12 (b) (1) of the Rules of Civil Procedure for lack of jurisdiction over the subject matter, it appearing on the face of the complaint that there is no diversity of citizenship between the parties and that the action does not involve a controversy under the Constitution and laws of the United States, be and the same is hereby granted upon the sole ground that the transactions complained of do not involve a security traded in or upon a securities exchange or upon an "over-the-counter" market and are therefore not within the purview of the Securities Exchange Act of 1934 which is set forth in the complaint as the basis of jurisdiction, and plaintiff's complaint and the cause or causes of action alleged therein are hereby dismissed with costs
 * * * (Tr. 40-41).

5. The appeal

On August 28, 1951, plaintiff filed a notice of appeal from the above-quoted portion of Judge McLaughlin's order (Tr. 42-43).

SPECIFICATION OF ERROR

The single error charged by appellant in her Statement of Points is the action of the district judge in dismissing the complaint on the ground that the transactions alleged did not fall within the purview of the Securities Exchange Act of 1934 because the security involved was one which had not been traded on an exchange or in the over-the-counter market by brokers or dealers (Tr. 47-48). The Commission also believes this was error.

STATUTE AND RULE INVOLVED

Section 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), provides:

It shall be unlawful for *any person*, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

To use or employ, in connection with the purchase or sale of *any security registered on a national securities exchange or any security not so registered*, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. [Emphasis supplied.]

Rule X-10B-5 promulgated by the Commission thereunder, 17 CFR § 240.10b-5, provides:

It shall be unlawful for *any person*, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice or course of business which operates or would

operate as a fraud or deceit upon any person,

in connection with the purchase or sale of *any security*. [Emphasis supplied.]

Where necessary, other statutory provisions are set forth in relevant part in the argument below.

SUMMARY OF ARGUMENT

I

The ruling below that Section 10 (b) of the 1934 Act is inapplicable to transactions in a security not traded on an exchange or by brokers or dealers in the over-the-counter market is contrary to the plain and unambiguous language of Section 10 (b) and to all other court rulings on the question. The ruling below is also vague and indefinite; for it provides no positive standard as to when the statute is applicable to non-exchange transactions in securities not registered for exchange trading. That Section 10 (b) is a catch-all anti-fraud provision applicable to *all* transactions in securities, provided that the mails or instruments of interstate commerce have been used, is made clear by the plain language of that section, the relevant terms of which are expressly defined in Section 3 of the Act. So read, Section 10 (b) fits understandably into a carefully planned statutory program. Narrowed in the manner adopted below, it becomes largely a meaningless duplication of other statutory provisions.

The limitation implied by the court below finds no warrant in the statute. Even if it be assumed *arguendo* that a statutory preamble may properly be

referred to under the circumstances, the preamble language in Section 2, upon which defendants have relied, affords no basis for narrowing the remedial scope of Section 10 (b). If anything, it shows that the broad coverage of the statute was not unintentional; for Section 2 refers to “over-the-counter” transactions (which include transactions between non-professionals) and particularly, as here, to transactions by corporate officers, directors, and principal stockholders. The legislative history, upon which defendants have also relied, lends absolutely no support to the proffered limitation and has no relevancy herein. This again assumes *arguendo* that it is proper to refer to the legislative history in the absence of any ambiguity in the statute. The history relied upon by defendants deals exclusively with the original provisions of Section 15 (since repealed) authorizing the regulation of the special two-way markets in particular securities made or created by certain brokers or dealers. In contrast, the present Section 15 applies to all transactions of brokers or dealers. Its caption “Over-the-Counter Markets” is the same as that of the original Section 15 and is intended merely as a convenient reference guide to the only section of the Act which deals exclusively with over-the-counter transactions. Contrariwise to defendants’ argument, Section 15 in the light of its caption does not circumscribe the scope of the “over-the-counter” markets subject to the Act—certainly not the scope of Section 10 (b), which contains no reference to this term. Actually, the portion of the over-the-counter market subject to the regulatory provisions of the present

Section 15 is much greater than that which defendants would subject to the catch-all anti-fraud provisions of Section 10 (b); for defendants would require “*regular trading*” in a *two-way* broker-dealer market in order to render applicable the protection of Section 10 (b).

Defendants’ argument that the 1934 Act is a “criminal” statute which should be construed “strictly” is of no importance; for Section 10 (b) clearly applies to the transaction alleged whether the section be given a “liberal” or “strict” construction. The failure of the Commission to promulgate Rule X-10B-5 until 1942 provides no indication of Commission disbelief in its power to promulgate the Rule, as defendants have argued. More important, that delay is in any event irrelevant herein for the Rule does not go beyond Section 10 (b) itself as respects the matter in controversy. The dispute relates basically to the construction of the statute itself.

The construction of the Act proffered by the defendants and adopted by the court below has untoward results when applied to many other provisions of the statute as well as to Section 10 (b). In addition to being erroneous, it is also impractical; for, under it the protection of the Act will depend to a substantial degree upon fortuitous circumstances which have no relevancy to the statutory purpose, and which may often be difficult, if not impossible, to establish.

II

The mailings alleged in the complaint are adequate to provide jurisdiction. Under Section 10 (b) and

Rule X-10B-5 it is not necessary that the mails be used to communicate the misrepresentations or statements of half-truths complained of. It is sufficient simply that the mails are used in connection with the fraudulent purchase or sale. Accordingly, the alleged uses of the mails to effect payment for, and to obtain delivery of, appellant's stock are sufficient under the many cases construing Rule X-10B-5 and the similar jurisdictional language of Section 17 (a) of the Securities Act of 1933, upon which the Rule was patterned. The decision in *Kemper v. Lohnes*, 173 F. 2d 44 (C. A. 7, 1949), relied upon by defendants below, involved the differently phrased jurisdictional language of Section 12 (2) of the Securities Act of 1933, with respect to which courts are divided. The courts are agreed, however, on the above stated construction of Rule X-10B-5 and Section 17 (a) of the Securities Act of 1933.

III

The courts are also in unanimous agreement with the ruling below that a private civil action may be maintained for the violation of Rule X-10B-5 even though the statute does not expressly provide for such an action. The implied right of action has been predicated (1) upon the basic principle of tort law which permits a person who has been injured by another's violation of a statute intended for his protection to sue for private relief, and (2) upon the provisions of Section 29 (b) of the 1934 Act which render void, as respects the rights of the violator, any contract made in violation of the statute, and which contain other indications that Congress assumed that

private actions could be maintained for the violation of many of the provisions of the statute which do not expressly authorize private recovery.

IV

The applicable statute of limitations for a Rule X-10B-5 action for damages is that of the state of the forum—here, Washington. This is because no federal statute of limitations has been prescribed for such an action, and the federal rule in such a case requires a reference to that local statute. We claim no expertise on the state law and, accordingly, express no opinion as to whether the court below properly rejected defendants' contention that the action was barred.

ARGUMENT

I

Section 10 (b) of the Securities Exchange Act of 1934, and Rule X-10B-5 thereunder, apply to all securities transactions involving the use of the mails or instruments of interstate commerce, whether or not the transaction involves a security traded upon an exchange or in the "over-the-counter" market of securities brokers or dealers

1. The Ruling of the District Court

Judge McLaughlin did not rule that Congress could not outlaw fraudulent transactions in securities which are not professionally traded on exchanges or over-the-counter by brokers and dealers, where the mails or facilities of interstate commerce are involved. He ruled that Congress had not, in fact, done so. This is the first time any court has taken this narrow view of the 1934 Act. This, however, is not the first case in which such a narrow view of the federal statute

was urged by defendants charged with fraudulent securities transactions. As we show below, all the other court decisions are adverse to defendants-appellees. This is also the first appellate court test of this narrow view of the 1934 Act. It is somewhat odd that it has arisen in the context of an appeal from the only court ruling upholding that view.

We regard it as unfortunate that Judge McLaughlin did not write an opinion to support his disagreement with all the other district judges who have ruled on the point. Needless to say, it would have been helpful to this Court in evaluating his ruling, and to the parties and the Commission in briefing the appeal from that ruling. Judge McLaughlin's order states simply that the transaction was not "within the purview of the Securities Exchange Act of 1934" because it did "not involve a security traded in or upon a securities exchange or upon an 'over-the-counter' market" (Tr. 41). There is no indication of what type of trading in the "over-the-counter" market the court below would consider sufficient to provide jurisdiction. More specifically, would the court require that specific brokers or dealers have "made a market" in the security—that they have regularly published "bid" or "asked" quotations, or both, for the particular security? Defendants' district court briefs quoted descriptions of that particular type of broker-dealer activity as descriptions of the "over-the-counter" markets. If this is what the court had in mind, would it require a one-way or two-way market—*i. e.*, "bids" only or "asked" only, or both? Moreover, would it be sufficient that such a market had been

made at some time in the past, or would it be necessary to show that such a market was being made at the time of the transaction complained of? Again, would the market have to be made in the same locality as that in which the transaction complained of took place, or would it suffice that somewhere, no matter how distantly located, a broker or dealer had made or was making a market in the particular security? Or would the court below be satisfied by proof of the fortuitous circumstance that at some time and place, no matter when or where, the particular security had been the subject of a transaction involving a broker or dealer?

None of these problems is presented by Section 10 (b) itself, which, we believe, is applicable to *all* fraudulent securities transactions involving the use of the mails or facilities of interstate commerce irrespective of whether the security has been or is being professionally traded by brokers or dealers. They arise only when the plain language of the statute is held to mean something else. Exactly what else has not yet been made clear either by the defendants or by the court below. The only thing which is clear is that these defendants, like the others, are anxious to avoid the federal statute.

2. The Rulings of Other Courts

Three other courts have rejected the proffered limitation of Section 10 (b) and the 1934 Act; and, in another case, a closely similar, if not essentially the same, contention was also rejected. As we have stated, the ruling below is the only one which approves the suggested narrowing of the Act.

In the earlier lawsuit referred to in the complaint, brought by the other former minority shareholders against members of the control group and W. E. Difford, the United States District Court for the Eastern District of Pennsylvania rejected the very same contention of these defendants. *Robinson v. Difford*, 92 F. Supp. 145 (1950). As distinguished from the ruling below, the decision in the Pennsylvania case was not handed down from the bench without opinion. Five months after the oral argument, and after study of several main and reply briefs, some of which were filed after the oral argument, the court issued its opinion. Defendants took no appeal, but, as indicated in the instant complaint, elected to make a substantial settlement. In the *Robinson* case, Judge Grim emphasized that Section 10 (b), in plain and unambiguous language, applies to transactions in any security, whether or not registered on an exchange, and whether or not the security was ever traded by brokers or dealers in the "over-the-counter" market. "This," he said, "is so clear from the language of Section 10 (b) itself that no other proper interpretation is possible" (92 F. Supp., at 148). Accordingly, he refused to consider defendants' argument (which we shall discuss below) based on the preamble language of Section 2 and a selection of excerpts from the legislative history of the Act. The preamble, he said, could in no event be relied upon "to alter the plain and unambiguous provisions of Section 10 (b)," and the legislative history, likewise, need not be referred to where the statute is clear (*ibid.*). Judge Grim also considered the other operative pro-

visions of the Act and concluded that none of them gave any support to defendants' suggested limitation (*id.*, at 148–149).

More recently, the same contention was rejected by the United States District Court for the District of Delaware in *Speed v. Transamerica Corp.*, 99 F. Supp. 808 (1951). In that case, former minority stockholders sued the majority stockholder for failing to disclose material inside information in purchasing their shares—information which would have shown that the stock was worth several times more than plaintiffs were paid. The narrow construction of the Act, adopted by the court below in the instant case, was urged *inter alia* by way of defense. As in the instant case, the defendant relied upon the preamble language of Section 2 and the same collection of excerpts from the legislative history. Chief Judge Leahy concluded that there was no merit in the proffered construction. In so doing, he gave special attention to the definitions in Section 3 of the various terms used in Section 10 (b). He, too, found Section 10 (b) to be plain and unambiguous. We refer the Court to his excellent analysis reported in 99 F. Supp., at 830–831.

The contention was also made and rejected by the United District Court for the District of Columbia in *Grand Lodge of International Association of Machinists v. Highfield*, Civ. No. 3661–48. The complaint charged officers and directors with fraud in the purchase of the shares of the principal stockholder, a labor union. Defendants moved to dismiss the Rule X–10B–5 count on the ground that the stock

was not registered on any exchange and had not been traded in the brokers-dealers' over-the-counter market.⁷ On January 24, 1949, Judge Letts entered an order denying the motion to dismiss. There was no opinion.⁸

A closely similar, or perhaps essentially the same, contention—namely, that Section 10 (b) has no application to transactions in the stock of a closely held corporation—was also rejected in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E. D. Pa. 1946). The complaint alleged that, in violation of Rule X-10B-5, the defendants, two shareholders and directors of a

⁷ Paragraph 5 of the "Opposition of Defendants to Plaintiff's Motion for Leave to Amend" in the *Grand Lodge* case, which was incorporated by reference into defendants' Motion to Dismiss the third count of the amended complaint (alleging violation of Rule X-10B-5), stated:

"The defendants are not, and were not brokers, dealers in securities, or otherwise subject to the jurisdiction of the Securities and Exchange Commission with respect to the matters referred to in the complaint."

Defendants' supporting "Memorandum of Points and Authorities" in that case argued (pp. 1-2):

"It is significant that no authorities are cited in support of plaintiff's position that the transaction referred to in the original complaint is within the purview of the Securities and Exchange Act. As a matter of fact, we submit that the Act itself clearly indicates that it has no application to this case. Section 2 recites:

[Section 2 is quoted]

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"Furthermore, *it is not alleged that the stock purchased by these defendants was listed on any exchange or traded in over-the-counter*. The fact is, it was not so listed, and so far as these defendants are aware, was not traded in an 'over-the-counter market'. * * *" [Emphasis ours.]

⁸ See 59 Yale L. J. 1120, 1140, n. 95 (1950). This case was also settled before trial.

corporation possessing only four shareholders, had induced the plaintiffs, the other two shareholders and directors, to sell their shares to them by fraud, including nondisclosure of material corporate information. There was no stock exchange trading in the stock and no allegation that it had ever been dealt in by brokers or dealers. It was held that the complaint stated a cause of action. Defendants had denied the applicability of Section 10(b) because (1) the stock was never listed on any exchange or traded in the "over-the-counter market," and (2) the sellers were not "investors" intended to be protected by the statute.⁹ The court, in denying the motion to dismiss, stated:

* * * *the whole statute discloses a broad purpose to regulate securities transactions of all kinds, and as part of such regulation, the specific section in question provides for the elimination of all manipulative or deceptive*

⁹ The footnote observation in *Robinson v. Difford* (92 F. Supp., at 149, n. 6) that the first question was not raised in the *Kardon* case is incorrect. Thus the brief of the defendants Slavins in the *Kardon* case argued (p. 11):

"Only four persons, the two plaintiffs and the two defendants are involved in the purchase and sale of the securities in question, i. e., the common stock of the two Michigan corporations, *which was never listed on any Exchange, nor traded in the Over-the-Counter market*. Between them, the four owned all of the outstanding capital stock of the two corporations. There is no outside interest in any of the securities of the two Michigan corporations; there is, therefore, no public interest, since the two Kardons and the two Slavins hold all of the outstanding stock to the exclusion of the public. Nor are there any investors whose interest requires protection. *The plaintiffs cannot claim to belong to the investing public* insofar as these two corporations are concerned." [Emphasis ours.]

methods in such transactions. * * * I cannot agree * * * that “investors” [as used in Section 10 (b)] is limited to persons who are about to invest in a security or that two men who have acquired ownership of the stock of a corporation are not investors merely because they own one-half of the total issue (69 F. Supp., at 514, emphasis supplied).

In a second opinion in the *Kardon* case, 73 F. Supp. 798 (1947), following a trial on the merits, in granting the relief sought by plaintiffs on the basis of findings upholding the allegations of the complaint, Chief Judge Kirkpatrick further observed:

The acts of the defendants specified in the complaint constituted a violation of the Act. *Section 10(b)* makes it unlawful to use any deceptive device, in contravention of the Commission’s rules, in connection with the purchase of *any security registered or unregistered*. *Rule X-10B-5* specifically makes it unlawful to “employ any device * * * to defraud * * * to omit to state a material fact necessary to make the statements made * * * not misleading or to engage in any act, practice or course of business which * * * would operate as a fraud or deceit * * *.” Under any reasonably liberal construction these provisions apply to directors and officers who, in purchasing the stock of the corporation from others, fail to disclose a fact coming to their knowledge by reason of their position, which would materially affect the judgment of the other party to the transaction (73 F. Supp., at 800). [Emphasis supplied.]

Slavin v. Germantown Fire Insurance Co., 174 F. 2d 799 (C. A. 3, 1949), is also worthy of mention. The stock in that case was part of a new issue being offered first to policy holders of an insurance company which was being converted from a mutual to a stock company. It was not traded on an exchange and there is no indication that any broker-dealer "over-the-counter" market had been developed at the time of the transactions in question. A majority of the court of appeals directed dismissal of the action only because it felt that whatever fraud may have been involved was vitiated by defendant's "last minute" disclosure. It seems clear from the opinion that plaintiffs would have recovered absent this disclosure.¹⁰

We also call attention, in passing, to the decisions under the almost identical language of Section 17 (a) of the Securities Act of 1933 (hereinafter sometimes called the "1933 Act"), 15 U. S. C. § 77q (a). In *Rosenberg v. Globe Aircraft Corp.*, 80 F. Supp. 123, 124 (E. D. Pa. 1948), the court, speaking of the 1933 and 1934 Acts, stated that "The two acts are unquestionably in pari materia and must be construed together to make a consistent whole," and that accordingly the court should look "at them as one statute." The antifraud provisions of Section 17

¹⁰ See also *Birnbaum v. Newport Steel Corp.*, 98 F. Supp. 506, 508 (S. D. N. Y. 1951), in which the court stated: "The Rule was designed to fill a void that had long existed in the Securities and Exchange Commission's control over fraudulent dealing in securities, i. e., the absence of any prohibition against fraud practiced on purchasers or sellers of securities by persons who were not brokers or dealers."

(a), it appears, have repeatedly been held applicable to sales of securities which were not traded on an exchange or by securities brokers or dealers. See, *e. g.*, *S. E. C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943); *U. S. v. Earnhardt*, 153 F. 2d 472 (C. A. 7, 1946), *cert. denied*, 328 U. S. 858 (1946); *U. S. v. Carruthers*, 152 F. 2d 512 (C. A. 7, 1945), *cert. denied*, 327 U. S. 787 (1946); *Bowen v. U. S.*, 153 F. 2d 747 (C. A. 8, 1946), *cert. denied*, 328 U. S. 835 (1946); *U. S. v. Monjar*, 147 F. 2d 916 (C. A. 3, 1944), *cert. denied*, 325 U. S. 859 (1945).

3. Summary analysis of the statute

It will be observed that Section 10 (b), by its very terms, is designed to give the Commission rule-making powers with respect to fraud in the purchase or sale of securities virtually as broad as the reach of the federal power, and that Rule X-10B-5 fully exercises that power with respect to purchases or sales of any security. The antifraud provisions of Section 15 (c) (1), 15 U. S. C. § 78o (c) (1), are applicable only to nonexchange transactions by brokers or dealers. Section 10, however, expressly applies to transactions by "any person." The term "person," it should be noted, is defined broadly by Section 3 (a) (9), 15 U. S. C. § 78c (a) (9), to include any individual and various types of business organizations, as distinct from more limited definitions of the terms "broker" and "dealer" in Section 3 (a) (4) and 3 (a) (5), 15 U. S. C. §§ 78c (a) (4) and 78c (a) (5). While paragraph (a) of Section 10 deals only with short sales or stop-loss orders on

the exchanges, paragraph (b) applies to fraudulent activities in the purchase or sale of "any security registered on an exchange or any security not so registered."¹¹ It is difficult to see what more sweeping language could have been found. Section 3 (a) (12), 15 U. S. C. § 78c (a) (12), which specifies the types of securities which are exempted or which may be exempted by the Commission from certain regulatory provisions of the Act, contains no exemption of the type suggested by the defendants. Moreover, *no securities whatever are exempted from the antifraud provisions of Section 10 (b)*. It should also be noted that the term "security" is broadly defined in

¹¹ Use of the quoted language rather than the briefer phrase "any security" was intended to buttress the provisions of Section 33, 15 U. S. C. § 78gg, in the event of an attack on constitutional grounds. Section 33 provides that should "the application of [any] provision [of the Act] to any person or circumstances * * * be held invalid * * * the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby." Thus, if for any reason Section 10 (b) were held unconstitutional as respects its application to "any security not so registered," its applicability to "any security registered on a national securities exchange" would not be affected thereby. It is evident from the use of the briefer phrase "any security" in Rule X-10B-5 in place of the quoted statutory language that the Commission itself never had any doubt as to the intended broad scope of Section 10 (b). An agency's construction of a statute which it administers is, of course, entitled to considerable weight. *S. E. C. v. Associated Gas & Electric Co.*, 99 F. 2d 795, 797 (C. A. 2, 1938) ; *Roland Co. v. Walling*, 326 U. S. 657, 676 (1946) ; *U. S. v. American Trucking Assns.*, 310 U. S. 534, 549 (1940). The validity of Section 10 (b) is not an issue in the instant case. The section and rule were held constitutional in *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 831-832 (D. Del. 1951). See also *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783, 786 (C. A. 2, 1951).

who may have been swindled by a person other than a broker or dealer, and who thus may have no right of recovery under either Section 9 (a) or Section 15 (c) (1), is entitled to sue for the violation of Section 10 (b).

Violations of the antifraud provisions may be enjoined at the instance of the Commission, or, in the case of wilful violations, may be criminally prosecuted by the Department of Justice on the Commis-

against fraudulent or deceptive securities transactions might be helpful to the Court at this point. Fraud or deception in certain types of transactions was deemed by Congress to require special treatment, and many of the provisions of the 1934 Act and the 1933 Act reflect that program. Thus, as we have already indicated, Section 9 of the 1934 Act, 15 U. S. C. § 78i, deals with fraud in the context of manipulative transactions in securities registered for trading upon an exchange; whereas Section 15 (c), 15 U. S. C. § 78o (c), is limited in coverage to fraudulent and deceptive transactions by securities brokers and dealers not effected upon an exchange. Similarly, Section 18 of the 1934 Act, 15 U. S. C. § 78r, deals only with liability for misleading statements in applications, reports, and documents filed under that statute. In the 1933 Act, Section 11, 15 U. S. C. § 77k, pertains to liability arising from false registration statements; Section 12 (2), 15 U. S. C. § 77l (2), deals with liability resulting from misrepresentations or statements of half-truths in prospectuses or oral communications; and Section 17 (b), 15 U. S. C. § 77q (b), is directed against certain types of touting. In addition, Section 24 of the 1933 Act, 15 U. S. C. § 77x, and Section 32 of the 1934 Act, 15 U. S. C. § 78ff, provide penalties for wilful violations of these statutes and for wilfully false or misleading statements in documents required to be filed with the Commission. Each statute, however, has a broad general anti-fraud provision *in addition* to such provisions of relatively narrow scope. In the 1933 Act that broad provision is Section 17 (a), 15 U. S. C. § 77q (a). Section 17 (a), however, covers only fraud in the *sale* of a security. The 1934 Act provision, Section 10 (b), is even broader, for it applies to fraud in the *purchase* as well as in the sale of a security. While Congress has not under-

sion's recommendation. The Commission's personnel and funds, however, are quite limited. It cannot even attempt to nip every fraud in the bud, or to investigate fully every possible violation from the standpoint of potential criminal prosecution. Its efforts must necessarily be expended where they are likely to do the most public good. In many cases where the Commission has taken no court action, however, the federal securities statutes have been privately en-

taken in connection with the *purchase* of securities to parallel the registration requirements of the 1933 Act applicable, with certain exceptions, to the sale of securities through a public offering, there is, of course, no more reason for not affording a broad federal remedy for fraud in connection with the purchase of securities than in connection with their sale. As we have said, Section 10 (b), as implemented by Rule X-10B-5, reflects the intention to make the remedy for fraud in the securities field practically as broad as the reach of the federal power in respect of interstate commerce and the mails. Except for its coverage of purchases as well as sales, the language of Rule X-10B-5 is essentially the same as that of Section 17 (a) of the 1933 Act upon which it was patterned.

As we have already indicated, the catch-all nature of these general antifraud provisions in each statute is further illustrated by the fact that exemptions from various regulatory sections, which are available with respect to certain types of securities and certain types of transactions in securities, are *not* available under these antifraud provisions. With regard to the 1934 Act, see p. 25, *supra*. In the 1933 Act the antifraud provisions of Section 17 (a) apply to securities *transactions* exempted from various regulatory provisions, *e. g.*, nonpublic offerings which are exempted from the registration requirements of the 1933 Act [Section 4 (1), 15 U. S. C. § 77d (1)], as well as to classes of *securities* similarly exempted from various regulatory provisions [see Sections 3, 17 (c), 15 U. S. C. §§ 77c, 77q (c)]. When Congress desired to delineate the persons, transactions, or securities covered or excluded from the coverage of a particular provision, it appears that it knew exactly how to do so.

forced through actions for damages or other relief by persons who have been victimized. While in most situations involving violations of Rule X-10B-5 a defrauded person can bring an action in the state court for common-law fraud and deceit, an action in the federal court for the violation of the rule has distinct advantages from the standpoint of the plaintiff.¹³ To aid the courts on questions involving the proper interpretation of the federal securities statutes, the Commission frequently participates as *amicus curiae*, as it has in the instant case.

4. Evaluation of the various arguments submitted in support of the construction proffered by defendants and adopted by the court below

Appellees' briefs have not yet been filed. We do have copies of the briefs they filed as defendants in the court below, however, and we assume that they will make substantially the same arguments in this appeal. Our brief in the proceedings below likewise was filed before those of the defendants, and was based on the arguments unsuccessfully made by these defendants in the *Robinson v. Difford* case. Defendants' briefs in the court below, taken as a whole, strike us as a somewhat improved version of the argument presented in the earlier case. We did not receive copies of these briefs until after Judge McLaughlin handed down his ruling, and this is our first opportunity to evaluate defendants' argument as suc-

¹³ For an excellent discussion of this particular point, see Comment, *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 Yale L. J. 1120, at 1123-1126, 1130-1133 (1950). See also pp. 59-60, *infra*.

For a general discussion of fraud concepts under the SEC statutes, see Loss, *Securities Regulation* (1951), c. XI.

cessfully presented below. Since Judge McLaughlin filed no opinion, we cannot tell how much of this argument he approved and how much he disapproved, if any. But it seems reasonable to assume that he went along with defendants' basic rationale.

We believe that we have shown that Section 10 (b) on its face is plain and unambiguous; and, given that plain meaning, it fits well into a carefully planned statutory program. Defendants' problem is, therefore, to convince this Court that Section 10 (b) should not be read literally, but should be watered down by implied limitations. The source of such implied limitations, they say, is the statutory preamble in Section 2, 15 U. S. C. § 78b. The preamble, they contend (although nowhere does it say so), indicates that Congress did not contemplate legislating with respect to transactions in securities which have not been traded on an exchange or by brokers or dealers in the over-the-counter market. To bolster this argument they submitted a number of quotations from the legislative history of the Act—quotations which we show below have no relevancy to the instant question, but which, defendants contended, support their narrow view of the statute. They have also made some other arguments of subordinate character, and we shall take up each of them; but the statutory preamble and the selected excerpts from the legislative history apparently constitute their basic stock in trade.

In the *Robinson v. Difford* case Judge Grim was on firm ground when he refused to enter into the controversy as to the proper meaning of the preamble

section for the reason that “reliance on the preamble statement of section 2 in order to alter the plain and unambiguous provisions of section 10 (b) would violate a basic canon of statutory construction that statements in a preamble may be referred to only for the purpose of clarifying an ambiguity in a statutory provision” (92 F. Supp., at 148), citing *Yazoo & Mississippi Valley R. R. v. Thomas*, 132 U. S. 174, 188 (1889); *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 563 (1892); *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52, 56 (C. A. 8, 1940); Sutherland, *Statutes and Statutory Construction* (3d ed.), § 4820; Crawford, *Statutory Construction* (1940), § 205. This canon of construction gives recognition to the fact that a preamble statement is necessarily generalized in character and cannot deal with all the problems covered by a comprehensive statute. Accordingly, a preamble is not intended to provide the basis for changing the plain meaning of a specific statutory provision. In the court below defendants argued that Judge Grim improperly confined himself to Section 10 (b); and they supplied quotations from various authorities to the effect that a statute must be construed as a harmonious whole.¹⁴ The fact is, however, that Judge Grim did consider the various operative provisions of the Act in reaching his ultimate conclusion. He expressly found that “there are no other sections of the Act which indicate that Congress intended to limit the application of the Act to transactions involving either registered securities or unregistered securities traded in the over-the-counter

¹⁴ Brief of defendants John R. Robinson et al., pp. 30 *et seq.*

market” by brokers or dealers (92 F. Supp., at 148–149). In brief, Judge Grim’s decision, in light of the authorities quoted by the defendants themselves, is a model of proper statutory construction. In rejecting the same narrow construction proffered in the *Speed* case, Chief Judge Leahy likewise considered other relevant provisions of the Act and concluded that there was no basis for implying limitations into the unambiguous provisions of Section 10 (b) (99 F. Supp., at 830–831). While we mention the foregoing canons of statutory construction, we do not rest upon them in this brief; for we do not believe that the preamble in Section 2 shows a congressional purpose to limit the scope of Section 10 (b), as defendants contend. Accordingly, we shall discuss Section 2 below.

Judge Grim’s refusal to go into the legislative history of the Act likewise was proper under the circumstances. He had already found that the statute was unambiguous. Accordingly, he applied another basic canon of construction—that “the legislative history of an act may not properly be considered in construing an unambiguous statutory provision such as section 10 (b)” (92 F. Supp., at 148), citing *Ex parte Collet*, 337 U. S. 55, 61 (1949); *Wilbur v. U. S.*, 284 U. S. 231, 237 (1931); *U. S. v. Missouri Pacific Ry.*, 278 U. S. 269, 277 (1929); *Railroad Commission of Wisconsin v. Chicago, B. & Q. Ry.*, 257 U. S. 563, 588–589 (1922). In the court below, the defendants argued that the cited decisions of the Supreme Court should be considered in light of what they claim to be the present policy of the Supreme Court and other

the activities of brokers and dealers in the over-the-counter market had to await further study and later amendments. Thus, in the *original* Section 15 of the Act, Congress confined itself to delegating to the Commission the authority to promulgate appropriate regulations with respect to a small portion of the over-the-counter markets—namely, the two-way markets in particular securities maintained by certain brokers or dealers, or both, which, in a limited way, were comparable to the exchange markets. We shall have more to say about the original Section 15 later. As in the 1933 Act, Congress also inserted a catch-all antifraud provision in the 1934 Act—namely, Section 10 (b). Here, too, authority was delegated to the Commission to work out the details.

As already mentioned, the major battle concerned the regulation of the securities industry. The draftsmen of the Act anticipated a court test of the constitutionality of such regulation, particularly as respects the applicability of the “commerce clause.” The strict-constructionism of the Supreme Court of the mid-thirties was a factor to be kept in mind. Accordingly, various provisions of the Act were drafted in terms of their applicability to specified persons or specified transactions, and a general separability provision was inserted in Section 33. In Section 2, Congress, in effect, presented a brief in support of the over-all constitutionality of the regulation provided.¹⁷

¹⁷ Any doubt that this was the purpose of Section 2 can readily be eliminated by a perusal of the congressional hearings: see, *e. g.*, *Stock Exchange Regulation, Hearing Before the Committee on Interstate and Foreign Commerce, H. R., 73d Cong., 2d Sess., on H. R. 7852 and H. R. 8720, pp. 28, 153, 518 (1934).*

Necessarily, Congress spoke in ultimate conclusions of fact. It could not and did not attempt to set forth the evidence which persuaded it to enact each of the operative provisions of this statute. Certainly, it did not contemplate that its generalized findings, which omitted reference to many specific problems treated in the Act, would be used as the basis for narrowing the scope of provisions which had been drafted with considerable care.

There is no need to set forth Section 2 *in toto*. The language upon which defendants have relied is in the opening paragraph, which reads as follows:

For the reasons hereinafter enumerated, *transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets* are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions: [Emphasis supplied.]

Following this paragraph is a series of congressional findings with respect to the interstate character of the activities regulated, existing practices with respect

to the use of the mails and instrumentalities of interstate commerce, the effect of these activities upon the national economy, the public interest to be served by federal regulation, and so forth.

Section 2 does not, in specific terms, refer to the catch-all antifraud provisions of the statute. It does refer, however, to the need for federal "regulation and control" of transactions in the "over-the-counter markets" as well as on the exchanges. An over-the-counter transaction is simply one which takes place off an exchange, and includes securities transactions between nonprofessional traders. Assuming *arguendo* the significance which defendants ascribe to a preamble statement in ascertaining the scope of a statute, one would think that this reference in Section 2 would suffice to dispel any doubts as to the intended broad coverage of the 1934 Act. Defendants, however, have seized upon this reference as a basis for arguing just the contrary. They contend that an "over-the-counter" transaction is one necessarily involving a professional securities broker or dealer, and that the term has no application to transactions between non-professionals. Thus, they argue, Section 2 shows that Congress intended to regulate and control only transactions on exchanges and the nonexchange transactions in which brokers or dealers are involved, and that this limitation on the coverage of the statute should be read into every operative provision, irrespective of the literal language employed in a particular provision. There is also an added refinement to their argument. In the court below they were agreeable

to applying the statute to transactions between non-professionals provided that the security involved was registered for trading on an exchange or was “regularly traded” in the broker-dealer over-the-counter market. Such transactions, they explained, are “related to” trading in the organized markets and, as such, are within the intended scope of the Act.¹⁸ Nowhere did they cite any authority for the proposition that an “over-the-counter” transaction must necessarily involve a professional broker or dealer,¹⁹ nor did they explain what they meant by “regularly traded ‘over-the-counter.’” In the latter regard they did quote with approval descriptions of the activities of brokers or dealers in “making or maintaining” two-way markets in particular securities.²⁰ In the absence of other explanation, we can only assume that this is the type of “regular trading” in a security which defendants would require as a condition to affording the protection of the statute to investors victimized by nonprofessionals.

Defendants’ basic argument that the term “over-the-counter” market relates only to the nonexchange trading of professional brokers and dealers is lacking

¹⁸ Brief of defendants John R. Robinson et al., p. 11.

¹⁹ As in the briefs of defendants in other cases, the defendants below relied upon quotations from various sources referring to or describing the activities of brokers and dealers in the systematized over-the-counter markets. Their rationale appears to be that, since the quoted discussions of the over-the-counter markets are confined to problems relating to the activities of professional traders, it should be assumed by implication that the term “over-the-counter” does not, in any case, include the trading of nonprofessionals. The fallacy of such reasoning is self-evident.

²⁰ Brief of defendants John R. Robinson et al., pp. 13-14, 16.

in merit.²¹ The fact that Section 3 (a) (1), 15 U. S. C. § 78c (a) (1), contains a *specific definition* of the term “*exchange*,” whereas the statute *nowhere defines* the term “*over-the-counter market*,” is consistent with the general understanding that an over-the-counter transaction is simply one which does not utilize the facilities of a securities exchange. Confronted in the *Speed* case with the same contention as that proffered by the defendants below, Chief Judge Leahy held (99 F. Supp., at 830):

An over-the-counter transaction is simply one which does not utilize the facilities of a securities exchange, but under the unambiguous provisions of the Act it covers the sale or purchase of a security on a doorstep as well as the trading of a professional securities broker. It would appear that over-the-counter transactions, as such, are not specifically regulated by the Act, but they are dealt with through provi-

²¹ We recognize that a footnote to the *Robinson v. Difford* opinion speaks of “securities traded in the over-the-counter market” as “those securities not registered on a national exchange which are traded through a securities broker or with a securities dealer” (92 F. Supp., at 148, n. 3). The court, nevertheless, rejected defendants’ ultimate contention as to the limited meaning of Section 10 (b). The court cited no authority for its view of an “over-the-counter” transaction. It is interesting to observe that the quoted footnote literally excludes a nonexchange transaction in an exchange-registered security from the purview of an “over-the-counter” market—something to which even the defendants would take exception. For reasons which we set forth in the text, we believe that this footnote statement improperly narrows the concept of the over-the-counter market. It is also interesting to observe that the footnote is inconsistent with the view we assume the instant appellees will take—that a two-way market in the particular security must be regularly maintained by a broker or dealer.

sions directed at the trading activity of "any person" in "any security". In short, Congress did not intend to limit application of the Act to transactions on exchanges and in the organized over-the-counter markets maintained by brokers and dealers.²²

In dealing with a similar contention in the *Kardon* case as to the scope of the statute, Chief Judge Kirkpatrick observed (69 F. Supp., at 514):

* * * the whole statute discloses a broad purpose to regulate securities transactions of all kinds, and, as part of such regulation, the specific section in question [Section 10 (b)]

²² See also the following statements quoted by Chief Judge Leahy (99 F. Supp., at 830, n. 11):

"Under the *Securities Exchange Act of 1934*, the over-the-counter markets are deemed to include all transactions in securities which take place otherwise than upon a national securities exchange. These markets are immense, the activities embraced therein are varied, and they are of the utmost importance to the national economy." [Emphasis ours.] H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938), p. 2; Sen. Rep. No. 1455, 75th Cong., 3d Sess. (1938), p. 2.

"First of all, what is meant by the over-the-counter market? Briefly, this market embraces all transactions in securities not made on stock exchanges." Wallace R. Fulton, Executive Director of the National Association of Securities Dealers, Inc., in *Fundamentals of Investment Banking*, Sec. 8, p. 42 (Investment Bankers Association of America, 1947).

To the same effect is Friend, *Activity on the Over-the-Counter Markets* (U. of Pa. Press, 1951), p. 5:

"The over-the-counter markets are broader and more diverse than the exchange markets. Generally speaking, they encompass all transactions in securities not effected on exchanges."

See also the definition of "over-the-counter market" in Munn, *Encyclopedia of Banking and Finance* (1937), p. 545, as "the market for securities not listed on any regularly organized exchange." For a general discussion of the over-the-counter market, see Loss, *Securities Regulation* (1951), pp. 709-715.

provides for the elimination of all manipulative or deceptive methods in such transactions.

As indicated in the quoted portion of the *Speed* opinion, the term "over-the-counter" is not used in the operative provisions of the statute, but over-the-counter transactions are dealt with through provisions such as those directed at the trading activity of "any person" in "any security" whether or not registered on an exchange [*e. g.*, Section 10 (b)], and trading by "brokers" and "dealers" in securities "otherwise than on a national securities exchange" [*e. g.*, Section 15]. The principal securities markets are, of course, the national exchanges and the relatively systematized over-the-counter markets maintained by professional brokers and dealers. Hence a major portion of the statute is devoted to provisions which, in themselves and in conjunction with the rules promulgated thereunder, regulate these markets in considerable detail. It is obvious, however, that the provisions dealing with the exchanges and over-the-counter markets of brokers and dealers do not cover all the potentialities of fraud in the purchase or sale of securities. As we have already shown, outside the scope of these provisions are many transactions in non-registered securities not effected in the organized securities markets. They include, as here, the trading activities of corporate officers, directors, and controlling stockholders in the securities of their own corporations. It is relevant to note at this point that trading by corporate insiders is one of the relatively few practices *expressly* mentioned in the Section 2 preamble as giving rise to the need for the federal

statute. As previously stated, it was to encompass the large volume of trading activity not subject to other provisions of the 1934 Act that Congress enacted the comprehensive anti-fraud provisions of Section 10 (b).

That defendants' proffered construction of Section 2 cannot be correct is further emphasized by the broad definition which Congress gave to the term "security" in the very next section. As we have already mentioned, *supra*, p. 26, Section 3 (a) (10) defines the term "security" to include such varied types as "investment contracts" and "certificates of interest or participation in any profit sharing agreement"—securities which can hardly be conceived of as the subject of trading on an exchange or by securities brokers or dealers—certainly not the systematized trading defendants would require. *S. E. C. v. W. J. Howey Co.*, 328 U. S. 293 (1946),²³ to which we have referred, is only one of many cases pertaining to various schemes involving "sales" or "leases" of tangible property and comprehending collateral arrangements whereby the sellers generally retain control over the subject property, and their management or efforts are relied upon for the expectation of profits to the titular owners or lessees, and where the "sale" or "lease" in combination with such collateral

²³ The *Howey* case was concerned with the similar definition of a "security" in Section 2 (1) of the Securities Act of 1933, 15 U. S. C. § 77b (1). The Supreme Court rejected a similar defense that the statute was not intended to regulate the type of transaction involved, holding that this contention gave too narrow a construction of a piece of legislation which was intended to be broadly remedial in scope.

arrangements has been held to constitute a "security" within the meaning of the federal securities laws.²⁴ This is another consideration to which Chief Judge Leahy referred in the *Speed* case in concluding that there was no merit to the proffered narrow construction of the 1934 Act (99 F. Supp., at 830-831).

(b) *The legislative history*

In an effort to overcome the plain language of Section 10 (b), and the above analysis which demonstrates that this language was intended to mean exactly what it says, defendants below, like the defendants in the other cases referred to, submitted various excerpts from the legislative history of the 1934 Act which, they contended, show that Congress

²⁴ The following are illustrative:

Oil and gas leases with collateral representations that the seller would drill a well on the leased or nearby land which would prove the value of the leases: *S. E. C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943); *Atherton v. U. S.*, 128 F. 2d 463 (C. A. 9, 1942); *U. S. v. Earnhardt*, 153 F. 2d 472 (C. A. 7, 1946), *cert. denied*, 328 U. S. 858 (1946).

Tung tree acreage coupled with service contracts: *S. E. C. v. Tung Corporation of America*, 32 F. Supp. 371 (N. D. Ill. 1940); *S. E. C. v. Bailey*, 41 F. Supp. 647 (S. D. Fla. 1941).

Silver foxes coupled with a ranching agreement: *S. E. C. v. Payne*, 35 F. Supp. 873 (S. D. N. Y. 1940).

Conditional bills of sale for oyster half-shells to be planted on oyster bottom acreage: *S. E. C. v. Cultivated Oyster Farm Corp.*, CCH Fed. Sec. L. Rep., ¶90,121 (S. D. Fla., No. 350, March 22, 1939).

Undivided interests in specified fishing boats: *S. E. C. v. Pyne*, 33 F. Supp. 988 (D. Mass. 1940).

Whiskey warehouse receipts and bottling contracts: *S. E. C. v. Bourbon Sales Corp.*, 47 F. Supp. 70 (W. D. Ky. 1942), and *Penfield Co. of California v. S. E. C.*, 143 F. 2d 746 (C. A. 9, 1944), *cert. denied*, 323 U. S. 768 (1944).

really did not mean to subject "private transactions," like the instant one, to even the antifraud provisions of the Act. Again assuming *arguendo*, as defendants contend, that the legislative history may be referred to under such circumstances, we submit that the legislative history which defendants quoted in the court below does not show this and, actually, has no relevancy to the instant question. It deals with the regulation initially authorized by the *original* (*but since repealed*) provisions of Section 15, 48 Stat. 895, as respects the special markets "made or created" by brokers and dealers "for both the purchase and sale" of particular securities. This is a *specific type of trading activity* in the over-the-counter market, and should not be confused with the *scope* of the over-the-counter market itself. Confusion of the two concepts appears to be the basic ingredient of defendants' legislative history argument; for, without such confusion, there is not even a superficial semblance of merit to it.

We have already mentioned that, in 1934, Congress did not believe that it had sufficient information concerning the workings of the broker-dealer over-the-counter market to enact comprehensive statutory provisions with respect to the regulation of the various activities of brokers and dealers. Pending further study, which resulted in later amendments to the statute, it authorized the Commission to issue regulations which respect to the type of trading activity in the over-the-counter market which bore the closest resemblance to exchange trading and which, perhaps in a more limited fashion, presented comparable op-

portunities for manipulation. This authorization was contained in the original Section 15, with which the cited legislative history deals. In 1936 the original Section 15 was repealed, and comprehensive provisions of much broader scope were enacted respecting the activities of brokers and dealers. Section 15A, which rounded out the statutory program in this respect, was enacted in 1938. The present Section 15 encompasses all the trading activities of brokers and dealers. "Making or creating" a market in particular securities is not specifically referred to. Manipulative or deceptive practices in this or any other type of broker-dealer trading, however, are outlawed by special antifraud provisions of broad scope applicable to the nonexchange trading activities of brokers and dealers: Section 15 (c) (1).

The original Section 15 was a regulatory measure and not an antifraud provision as such. The catch-all provisions of Section 10 (b), it was probably felt at the time, would be a sufficient deterrent against fraudulent practices. For the information of the Court, we are setting forth below Section 15 as originally enacted. It should be observed that, in addition to authorizing the Commission to regulate transactions in two-way markets in particular securities which were "made or created" by particular brokers or dealers, and to require the registration of brokers and dealers making such markets, the Commission was authorized to require the registration of the securities for which such special markets were "made or created," and to make special provision with respect to securities which were listed or entitled

to unlisted trading privileges on any exchange, but which were not registered for exchange trading. The latter regulatory features, in particular, were the subject of the congressional debates which defendants cited. The original Section 15 read as follows:

It shall be unlawful, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest and *to insure to investors protection comparable to that provided by and under authority of this title in the case of national securities exchanges*, (1) for any broker or dealer, singly or with any other persons or person, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of *making or creating, or enabling another to make or create, a market, otherwise than a national securities exchange, for both the purchase and sale of any security* (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills, or unregistered securities the market in which is predominantly intrastate and which have not previously been registered or listed), (2) or for any broker or dealer to use any facility of any such market. Such rules and regulations may provide for the *regulation of all transactions by brokers and dealers on any such market*, for the *registration with the Commission of dealers and/or brokers making or creating such a market*, and for the *registration of the securities for which they make or create a market* and may make *special provision with respect to securities* or specified classes thereof *listed, or entitled to unlisted trading privileges*,

upon any exchange on the date of the enactment of this title, which securities are *not registered* under the provisions of section 12 of this title. [Emphasis supplied.]

If, in reading the excerpts from the legislative debates submitted by the defendants below, it is kept in mind (1) that the “over-the-counter” markets which the participants are talking about are the highly specialized markets for which extensive regulation was authorized by the original Section 15, (2) that the legislators were not discussing, and did not purport to discuss, the concept of the scope of the over-the-counter market generally, and (3) that the antifraud provisions of Section 10 (b) were not in controversy, it will be readily apparent that there is no merit to defendants’ argument that their proffered views as to the limited scope of the “over-the-counter” market and of the statute itself are supported by the legislative history.

We shall discuss each of the excerpts from the legislative history which defendants submitted below. Because we prefer not to interrupt our argument with this lengthy specialized analysis and because this Court, like Judge Grim in the *Robinson v. Difford* case, may decide that reference to the legislative history is not warranted in light of the plain and unambiguous language of the statute itself, we have set forth this specialized discussion in Appendix A to this brief, pp. 78–85, *infra*.

Actually, the legislative history of the 1934 Act contains very little of specific applicability to Section 10 (b); and, so far as we know, there is nothing

therein which is of particular relevance to the instant controversy. Section 10 (b) was formulated late in the legislative process and, apparently, was not a controversial provision. The extensive remedial scope of the proposed Act as a whole, however, was frequently the subject of legislative comment; and the legislative history in this respect does indicate that members of Congress were aware of the fact that the proposed statute went far beyond the regulation of the organized securities markets. This is the legislative history to which Chief Judge Leahy referred in the *Speed* opinion (99 F. Supp., at 820, n. 12).²⁵ As we have stated before, the statute itself is sufficiently clear in this respect.

(c) *The caption of Section 15*

In the court below defendants argued, further, that Congress has defined the full scope of the "over-the-counter markets" in Section 15 of the Act, which bears that phrase as a section heading, and that

²⁵ For example, the extensive remedial scope of the bill which became the Securities Exchange Act of 1934 was described by Senator Steiwer on the floor of the Senate as encompassing not merely the regulation of stock exchanges and securities brokers and dealers, but as containing provisions which were applicable also "to the public at large and to all who may trade in securities, to all owners and holders of stock, to corporations, to their officials * * *" (78 Cong. Rec. 8296).

Compare also the statement of Representative Lea during the course of the House debate (78 Cong. Rec. 7861) :

"This bill, although it is called a bill to regulate national securities exchanges, is much broader in its practical operation. In fact, *the object of this measure is not merely to regulate exchanges—that is only incidental to its purpose. The real purpose of this regulatory measure is to protect the investors of the United States against fraud and imprudent investments * * **" [Emphasis supplied.]

Section 10 (b) should be limited accordingly. The argument, of course, is grounded on the assumption that the phrase “over-the-counter markets” must be read into Section 10 (b)—an assumption which Judge Grim refused to make in the *Robinson v. Difford* case. Defendants, of course, have challenged the validity of Judge Grim’s ruling; but, for reasons which we set forth below, we do not believe it matters much whether or not Judge Grim was correct in this respect.

Defendants have referred particularly to the anti-fraud provisions of Section 15 (c). Rather than attempt to paraphrase their argument, we quote from their principal brief below:

It will thus be noted that when Congress was referring to a security dealt with on an over-the-counter market it merely used the words “any security” with the qualifying words “otherwise than on a national securities exchange.” It seems obvious that since Congress, when deliberately defining a security dealt with in over-the-counter markets defined it in one place in the act as “any security otherwise than on a national securities exchange” that it meant precisely the same thing in Section 10 (b). Otherwise it would have included, after the words “or any security not so registered” in Section 10 (b), some language such as “including securities not traded in any over-the-counter market” (*Brief of defendants John R. Robinson et al.*, p. 23).

The logic in this argument, if there be any, is difficult to find. We believe that the argument is fallacious for either of the following reasons:

First: Section 15 (c) is expressly limited in application to transactions of a “*broker or dealer* * * * otherwise than on a national securities exchange.” In contradistinction, Section 10 (b) applies to “*any person*.” As we have already pointed out, Section 3 (a) (9) defines the term “person” very broadly, in contrast to limited definitions of the terms “broker” and “dealer” in Sections 3 (a) (4) and 3 (a) (5).²⁶ This alone provides a positive indication that, as respects nonexchange transactions, the coverage of Section 10 (b) was intended to go beyond the transactions dealt with in Section 15 (c). It should also be noted that the phrase “otherwise than on a national securities exchange” does not appear in Section 10 (b), which contains no limitations on where the fraudulent transaction must take place in order to come within the coverage of that section. Section 10 (b) simply authorizes the Commission to outlaw fraud in connection with the purchase or sale of “any security registered on a national securities exchange or any security not so registered.” It should be further noted

²⁶ The 1934 Act is obviously different from the statutes involved in *U. S. v. Katz*, 271 U. S. 354 (1926), and *U. S. v. Jin Fuey Moy*, 241 U. S. 394 (1916), which defendants cited below as authorizing the court to define the meaning of the various terms used in Section 10 (b). The statutes in the cited cases did not define the term “person,” and to have given the term its literal meaning would seriously have conflicted with the statutory schemes involved. In the instant case, the key terms—“person” and “security”—are specifically defined by the statute itself. Moreover, when they are given their express statutory definitions in construing Section 10 (b), that section fits well into a comprehensive statutory program. On the other hand, redefined in the manner suggested by the defendants, Section 10 (b) becomes largely a meaningless duplication of other statutory provisions.

that Section 15 (c) contains certain exemptions, whereas Section 10 (b) contains none. We believe it is clear from the foregoing that Congress deliberately excluded from this catch-all antifraud provision the limitations which defendants would now have this Court imply.

Second: Section 15 itself does not purport to define the scope of the over-the-counter markets, and such an intent cannot properly be derived from the heading of the section, whose only purpose is to provide a convenient reference guide. It should be remembered that the original Section 15 bore the same caption, and that its scope was much more limited than the present Section 15 (see pp. 46-48, *supra*). In fact, as we have already mentioned, in arguing that the Act should be limited in scope as respects nonexchange transactions to transactions in securities "regularly traded over-the-counter," defendants below illustrated their argument with quotations describing the specialized two-way over-the-counter markets encompassed by the original provisions of Section 15. Thus, on the one hand we find defendants arguing that a security must be traded in one of these specialized broker-dealers' markets in order that the Act be rendered applicable, and on the other hand arguing that the over-the-counter markets encompass the transactions covered by the present Section 15, which, of course, covers a much wider field. Section 15, today, applies to all nonexchange transactions by brokers or dealers, whether or not a market is being "made or created" in the particular security, or whether the broker or dealer is only buying or selling or trading

both ways. Section 15 is captioned "Over-the-Counter Markets" because it is the only section of the Act which deals exclusively, and today comprehensively, with the nonexchange activities of securities brokers and dealers²⁷—activities which constitute by far the largest portion of the over-the-counter securities market and the only portion of that market subjected to detailed regulation by this statute. Other provisions, Sections 9, 10, and 16, 15 U. S. C. §§ 78i, 78j, 78p, in dealing with other matters, legislate also with respect to over-the-counter transactions; but in view of the scope of those sections a heading similar to that of Section 15 would be inappropriate. As we have said, the purpose of a section heading is merely to afford a convenient reference guide to the subject matter of the section. Accordingly, the caption is not determinative of the scope of the section, and certainly not (as here) the scope of another section to which it is not affixed. See *Brotherhood of R. R. Trainmen v. Baltimore & Ohio Ry.*, 331 U. S. 519, 528–529 (1947); *U. S. v. Tomicich*, 41 F. Supp. 33, 34 (E. D. Pa. 1941), *aff'd*, 126 F. 2d 1023 (C. A. 3, 1942); *S. E. C. v. Timetrust, Inc.*, 28 F. Supp. 34, 40–41 (N. D. Calif. 1939). Defendants' argument, taken to its logical end, would mean that the 1934 Act would have to be restricted in application to exchange transactions alone because of its over-all title "Securities Exchange Act"—a conclusion which hardly deserves further comment.

²⁷ There is also, of course, Section 15A, which complements Section 15 and, as its heading indicates, deals with "over-the-counter brokers' and dealers' associations."

Defendants did not say so, but their argument below in this respect amounts to a contention that, as respects nonexchange transactions, Section 10 (b) has no independent significance but is apparently a useless duplication of Section 15 (c). We believe that we have shown that this is a great misconception of the statute.

(d) Strict construction of the 1934 Act as a criminal statute

In the court below defendants also argued that the 1934 Act is a criminal statute and its provisions must be strictly construed. They pointed to Section 32, 15 U. S. C. § 78ff, which provides penalties for *wilful* violations. Whether Section 10 (b) should be construed "strictly" or "liberally," we believe is of little importance; for we believe that the section, construed even "strictly," is too clear and unambiguous to warrant defendants' proffered limitation.

The identical argument was made without avail in the *Robinson v. Difford* case; and the same type of argument was expressly rejected by the Supreme Court in *S. E. C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943), a case involving the related 1933 Act. It may be observed at this point that, while there may be penal sanctions in appropriate cases for wilful violations of Rule X-10B-5, the federal securities laws, unlike the type of statute which is generally involved in the cases enunciating a rule of strict construction, are primarily remedial in purpose. In the *Joiner* case, Mr. Justice Jackson pointed to the differences in the views of state courts with respect to the question of "strict" or "liberal" construction of comparable pro-

visions in state "blue sky laws"—i. e., provisions which may afford the basis of either civil relief or penal sanctions, or both—and observed that "the weight of authority is committed to a liberal construction" (320 U. S., at 353). He concluded, however, that there was no point in choosing between "liberal" or "strict" constructions, since the statutory provision in question had only one intended meaning, whether applied in a civil or criminal case. In other words, the difference in the nature of the proceedings could affect only the required degree of proof of a violation and similar questions calling for different answers in the two types of proceedings. The Securities Act was held applicable to the transactions in the *Joiner* case, because, as here, it was unnecessary to do anything "to the words of the Act [but] merely accept them" (320 U. S., at 355).²⁸

²⁸ The authoritative value of a seemingly conflicting statement in the earlier Court of Appeals case of *Wright v. S. E. C.*, 112 F. 2d 89 (C. A. 2, 1940), which defendants cited, would appear to be nullified by the *Joiner* case. It is pertinent to note that even in the *Wright* case the court refused to apply criminal standards of proof in a proceeding under the 1934 Act to expel Wright from membership in designated national securities exchanges, which proceedings the court regarded as being "remedial" (112 F. 2d, at 94).

Rosenberg v. Globe Aircraft Corp., 80 F. Supp. 123 (E. D. Pa. 1948), which defendants also cited, did refer to Section 10 (b) as a "criminal statute," not for the purpose of restricting in any manner the scope of that section, but merely to explain the doctrine of implied civil liability arising from the violation of a statute making certain acts unlawful for the protection of a class of which plaintiff is a member. It may be pertinent to observe that, in a dissenting opinion in *Slavin v. Germantown Fire Ins. Co.*, 174 F. 2d 799, 815 (1949) (the dissent being from the majority's holding that the principal defendant was absolved from a

(e) The Commission's failure to promulgate Rule X-10B-5 until 1942

In the court below defendants also argued that the failure of the Commission to promulgate Rule X-10B-5 until 1942—eight years after the passage of the Act—indicates that the Commission itself did not believe that it had the power to promulgate a rule as broad in scope as it now states Rule X-10B-5 to be. Defendants quoted from a similar statement in a case note in 64 Harv. L. Rev. 1018 (1951)²⁹ which commented adversely on the *Robinson v. Difford* decision. This argument did not originate there. It was also made in the briefs filed in the earlier cases by these and other defendants who similarly sought to avoid the impact of Rule X-10B-5. As it appears to us, the author of the note obtained it from the defendants' brief in the *Robinson v. Difford* case, whence he seems to have gotten most of his other arguments and citations. The basic fallacy in this argument is that, with respect to the instant matter, Rule X-10B-5 does not go beyond the statute itself.

charge of fraud by a "last minute" disclosure), the Chief Judge of the Court of Appeals for the Third Circuit, the circuit in which the *Rosenberg* case was decided, took occasion to emphasize that "restrictive interpretation of the [1934] Act has been rejected," citing *Speed v. Transamerica Corp.*, 71 F. Supp. 457, 458 (D. Del. 1947), and *Charles Hughes & Co., Inc., v. S. E. C.*, 139 F. 2d 434, 437 (C. A. 2, 1943).

For similar views, see *Norris & Hirshberg, Inc. v. S. E. C.*, 177 F. 2d 228, 233 (C. A. D. C. 1949), *Hughes v. S. E. C.*, 174 F. 2d 969, 975 (C. A. D. C. 1949), and *Fry v. Schumaker*, 83 F. Supp. 476, 478 (E. D. Pa. 1947).

²⁹ The title of this case note is "Securities Acts—Federal Securities Exchange Act—Fraudulent Purchase of Non-Registered Shares of Closely-Held Corporation is Violation of Section 10 (b)."

*The basic controversy is not what Rule X-10B-5 means, but what Section 10 (b) itself means.*³⁰

As respects the authority granted by Section 10 (b), it was not, of course, limited in time. The Commission was entitled to move cautiously in determining the type of rule needed in light of its administrative experience and other relevant circumstances, including the existence of Section 17 (a) of the 1933 Act and the mail fraud statute (18 U. S. C., formerly § 388 now § 1341), and to proceed with care in drafting an effective rule. Relevant in this connection is the following statement by Mr. Justice Jackson in *U. S. v. Morton Salt Co.*, 338 U. S. 632, 647-648 (1950):

The fact that powers long have been unexercised may well call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than non-existent powers can be prescribed by unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted the [Federal] Trade Commission has been forfeited by nonuser.

See also *Shawmut Ass'n v. S. E. C.*, 146 F. 2d 791 (C. A. 1, 1945), involving the Commission's power

³⁰ There is thus no similarity between this case and *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U. S. 498 (1949) (cited both by the defendants and the author of the note), which did not involve any rule and in which the court was unable to find any statutory provision upon which to ground the power sought to be exercised by the Federal Power Commission.

to impose terms on the withdrawal of a security from listing with an exchange, where in rejecting a contention similar to that of the instant defendants the court stated (146 F. 2d, at 795):

Where the question is whether an administrative agency has the power to issue a prospective regulation or order without any retrospective aspect, the sole test is what power was given by the Constitution and by Congress; there is no doctrine of estoppel by prior disclaimer or prior disuse.³¹

(f) Statements from other sources relied upon by defendants below

In addition to excerpts from the legislative history dealing with the original Section 15, defendants submitted quotations from other sources which, they claimed, supported their narrow view of the Act. Two student notes in the Harvard Law Review do so in part or in whole; the other quotations—excerpts from certain statements by Commission officials—do not. Accordingly, we confine our discussion at this point to the notes in the Harvard Law Review. For our comment on the other quotations, we refer the Court to Appendix B, *infra* pp. 86–88, should the Court desire to examine the statements involved.

We have already mentioned that the *Robinson v. Difford* case is adversely commented upon in 64 Harv. L. Rev. 1018. In the court below defendants quoted this case note in its entirety. We have also observed

³¹ See also *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (C. A. 2, 1951), where the court, in considering other questions under Rule X–10B–5, took occasion to observe that the Rule “was validly promulgated by the S. E. C. pursuant to that Section” [i. e., § 10 (b)] (188 F. 2d, at 786).

that this student note appears to us to be but a summary of the various arguments in the defendants' briefs in the *Robinson v. Difford* case, documented largely with the same citations. As such, it closely parallels the briefs submitted by the defendants below. This note, accordingly, should be evaluated in the light of our analysis of defendants' arguments. We offer but one additional observation. The student writer states, among other things, that a defrauded minority stockholder has little need for the protection afforded by Rule X-10B-5, for "resort may still be had to state law, and most states impose the same obligation of fair dealing, at least on 'insiders,' " citing *Hotchkiss v. Fischer*, 136 Kan. 530, 16 P. 2d 531 (1932). We wish this were true; but unfortunately the need for Rule X-10B-5 stems principally from the fact that the common law of most states does not impose upon corporate insiders the same duty of fair dealing as does the federal statute, particularly as respects disclosure of material inside information. See *Fletcher on Corporations*, 1947 Rev. Vol. 3, §§ 1167-1174, and cases cited therein. The *Hotchkiss* case represents but a small minority view. *Id.*, § 1168.2, n. 78. The student note is inconsistent, in this respect, with two earlier notes—one in 59 Harv. L. Rev. 769, at 771 (1946),³² and the other in 61 Harv. L. Rev. 858, at 865 (1948)³³—in both of which it was recognized that the federal statute was designed to extend protection to

³² Entitled "SEC Action Against Fraudulent Purchasers of Securities."

³³ Entitled "Implied Liability under the Securities Exchange Act."

investors where the common law of most states was inadequate.

The note in 64 *Harvard Law Review* is a sequel to the note in 61 *Harvard Law Review*. The suggestion that Section 2 might be resorted to as a basis for cutting down the broad coverage of Rule X-10B-5 to transactions by professional traders first appeared in the Volume 61 note, although there was very little elaboration on this theme at that time. The earlier Harvard note was cited by the defendants in both the *Robinson v. Difford* and *Speed* cases, but to no avail. The two notes have some additional inconsistencies. Thus, the writer of the Volume 61 note suggests that the statute is applicable to transactions by corporate insiders, such as those involved in the instant case. The author of the Volume 64 note, closely paralleling the theme of defendants' briefs, adopts a narrower view under which a corporate insider who victimizes a minority stockholder would suffer no liability by virtue of the federal statute unless the particular security had been "regularly traded" by brokers and dealers in the over-the-counter market. Again, the Volume 61 note states that "restrictive interpretation [of the federal statute] has * * * been rejected." This statement is inconsistent with the restrictive view adopted in the same note, as well as with the Volume 64 note, which makes no pretense at a liberal interpretation of the statute but affirmatively urges a restrictive construction. For a better reasoned and more comprehensive student article on Rule X-10B-5, see *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 *Yale L. J.* 1120

(1950). The proffered limitation on the scope of the Act is rejected in the Yale article: *Id.*, p. 1140, n. 95.³⁴

5. Significance of the construction proffered by defendants and adopted by the court below

We pass, finally, to a consideration of some of the implications of defendants' proffered construction which was adopted by the court below.

We have already pointed out that, contrary to the statutory definition of the term "security" in Section 3 (a) (10), defendants' construction would limit application of the Act to conventional types of securities which are susceptible of trading in the systematized securities markets. We have likewise shown—assuming that defendants would condition the applicability of the Act as respects a security not registered for trading on any exchange upon a showing that the security has been "regularly traded over-the-counter" in the sense that some broker or dealer is maintaining or has maintained a two-way market in that particular security—that their prof-

³⁴ It is pertinent to observe that the notes in Volumes 61 and 64 do not represent the first instances in which the student section of the Harvard Law Review has advocated a construction of the 1934 Act which would seriously limit its remedial scope. Thus, in 1946, the Volume 59 note took the position that there could be no right of private action for the violation of Rule X-10B-5 (p. 779). That view has since been unanimously rejected by the courts. See pp. 72-75, *infra*. Confronted with court rejection of this view, the later note in Volume 61 withdrew the Harvard Law Review's disapproval of such a civil remedy. As mentioned previously, the narrow view of the substantive scope of Section 10 (b) which the student section of the Harvard Law Review is presently advocating has also been rejected by the various courts which have ruled upon the matter, excepting the court below, and we believe it should also be rejected by this Court.

ferred limitation also runs squarely counter to the express provisions of the present Section 15. That section, it should be recalled, in dealing with the activities of brokers and dealers in the over-the-counter market, contains no such restriction on its coverage. In fact, the limitation suggested by the defendants, if applied to Section 15, would in large measure nullify the effectiveness of that section.

Defendants' restrictive view also presents problems under other sections, for example Section 16 (b), 15 U. S. C. § 78p (b). That section requires holders of ten percent of any class of any equity security which is registered on a national securities exchange, and the officers and directors of the issuer of any such security, to disgorge to the corporation any profit realized by them from the purchase and sale, or sale and purchase, of *any* equity security of the issuer within a period of six months. While Section 16 (b) requires that there be at least one registered equity security, its provisions require the disgorgement of "short-swing" profits by such corporate insiders in any other equity security of the corporation, registered or unregistered, and irrespective of whether the security in question was ever traded, "regularly" or otherwise, by brokers or dealers. Defendants' theory as to the scope of the Act would require like restriction of the application of Section 16 (b) contrariwise to what seem to be its plain provisions.

Moreover, under defendants' view, a public offering of securities not registered for exchange trading, even were it nationwide, would not be subject to the anti-

fraud provisions of Rule X-10B-5 if the issuer saw to it that no securities brokers or dealers were involved, or at least that they did not make a two-way market in the particular securities. And this would be so despite the fact that the security would have to be registered under the 1933 Act before the offering could lawfully be made. Likewise, on the assumption that the securities were not yet the subject of a "two-way" broker-dealer's market, repurchases by corporate insiders from large numbers of public investors, under defendants' suggestion, would not be subject to the antifraud provisions of the 1934 Act. These results, of course, are absurd. They turn the statutory policy upside down; for in limited situations the federal securities laws provide just the reverse—*i. e.*, exemption from registration but not from the antifraud provisions. See pp. 25, 29, *supra*.

Defendants' view also would render the protective features of Section 10 (b) dependent on the fortuitous circumstance that somewhere a broker or dealer, no matter how distantly located, is making or had made a two-way market in the particular security. Not only is there lack of rational basis for conditioning the protection of the statute on so irrelevant a circumstance, but whether or not a broker or dealer is actually "making a market" in a particular security is a factual question which may often be difficult to answer even where he enters bid and asked quotations in the National Quotation Service daily sheets.³⁵

³⁵ See *In re M. S. Wien & Co.*, Securities Exchange Act Release No. 3855 (1946), for an example of the type of proof sometimes required to establish the fact that a broker or dealer had made a market in a particular security.

This is entirely apart from the fact that many brokers and dealers do not enter their quotations in the daily sheets or in any other publication, so that from a practical standpoint it may often be impossible to determine, under such a theory, whether or not a particular security holder is entitled to invoke the protection of the Act.

In sum, defendants' proffered construction would mean that a fraudulent transaction in a security which could not be shown to have been the subject of a two-way broker-dealer market—including a transaction by a corporate officer, director, or controlling stockholder involving the unfair use of inside information—could not be remedied under the federal Act, but under state law only, if at all, regardless of the interstate character of the transactions and the recognized insufficiency of many, if not most, local laws to deal effectively with such interstate transactions. It is obvious that such a view of the scope of the federal statute would "turn back the clock" a long way.

We respectfully submit that defendants' proffered limitation is contrary to the express language and clear purpose of Section 10 (b). Accordingly, we urge that it be rejected, and that the ruling of the court below accepting it be reversed.

II

The alleged uses of the mails to effect payment for and to obtain delivery of the securities purchased are sufficient under Rule X-10B-5

Paragraph V of the complaint alleges, albeit in general terms, that "the mails, telephone, telegraph

and other means and instruments of transportation in interstate commerce" were used in connection with the asserted fraud (Tr. 6). In paragraph XV there is a specific allegation that defendant John R. Robinson, on his own behalf and acting for the other defendants participating in the scheme at that time, used the mails to cause the First National Bank of Everett to instruct the National Bank of Commerce in Seattle, Washington, to transfer a credit of \$49,000 to plaintiff's account in the latter bank in payment for her stock, and to forward her shares, theretofore held in escrow pursuant to an option agreement, to the Everett bank for delivery to Robinson (Tr. 17-18). Subsequently, in paragraph XVIII (d), plaintiff alleges further uses of the mails and instrumentalities of interstate commerce in connection with the later purchases from other minority stockholders (Tr. 21).

Whether or not paragraph V, had it stood alone, would have been objectionable because of its generality³⁶ is an academic question in this case because paragraphs XV and XVIII (d) do allege specific uses of the mails. The relevancy and sufficiency of the allegations of paragraph XVIII (d) involve mixed questions of fact and law relating to the nature and scope of the scheme to defraud, upon which we shall not comment. The allegations of paragraph XV, we believe, are clearly sufficient; for they specifically charge that the defendants caused the mails to be used to effect payment of the purchase price and to obtain delivery of plaintiff's shares. As we men-

³⁶ See, in this connection, *S. E. C. v. Timetrust, Inc.*, 28 F. Supp. 34 (N. D. Calif. 1939).

tioned earlier, the court below did not rule on this question.

In the court below defendants relied upon *Kemper v. Lohnes*, 173 F. 2d 44 (C. A. 7, 1949), to support their contention that the complaint was insufficient because it did not allege that any misrepresentations or misleading statements were transmitted through the mails or instruments of interstate commerce. The *Kemper* case, of course, involved not Rule X-10B-5 but the differently phrased judisdictional language of Section 12 (2) of the 1933 Act, 15 U. S. C. § 771 (2). As we show below, the peculiar wording of Section 12 (2) has divided the courts on the question whether, under that section, the mails or instruments of interstate commerce must be used to transmit the misrepresentations or halftruths complained of, or whether it is sufficient if the federal facilities are used at some point in the sale of the security. But there is no such division as respects Rule X-10B-5, or Section 17 (a) of the 1933 Act, upon which the Rule is patterned. The courts are agreed that, under Rule X-10B-5 and Section 17 (a) of the 1933 Act, it is sufficient if the mails or instruments of interstate commerce were used at some point in the sale of the security, irrespective of whether the misrepresentations or half-truths were communicated by either of these facilities. Although there are many court decisions under Rule X-10B-5 and Section 17 (a) of the 1933 Act, including rulings upholding the sufficiency of mailings to effect payment for, or delivery of, the security (see *infra* pp. 70-72), defendants cited none of them below. They argued, instead, that Section

12 (2) of the 1933 Act and Rule X-10B-5 employed almost identical language (which, of course, is not true), and relied on the controversial *Kemper* ruling under Section 12 (2) as authority for their contention under Rule X-10B-5.

Section 12 (2) deals with civil liabilities arising out of *sales* of securities involving untrue or misleading statements, and provides:

Any person who—

* * * * *

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), *by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made, not misleading* (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. [Emphasis supplied.]

The courts are split on the question whether the third clause ("by means of" etc.) modifies the first clause ("sells a security" etc.) or the second ("by the use of any means or instruments" etc.). Under the first view, Section 12 (2) is read as if the word "and" appeared between the second and third clauses, so that it would suffice if there were mailings in the sale of the security whether or not the mailings contained the particular misrepresentations or half-truths complained of. Under the second view, the third clause is treated as a modification or continuation of the second clause and, as such, requires that the jurisdictional facilities be employed to transmit the misrepresentations. The Court of Appeals for the Second Circuit has adopted the first, or broader, view: *Schillner v. H. Vaughan Clarke & Co.*, 134 F. 2d 875 (1943). The Court of Appeals for the Seventh Circuit has followed the second, or narrow, view: *Kemper v. Lohnes*, 173 F. 2d 44 (1949). There are other holdings and dicta.³⁷ The Commission itself has expressed the opinion that the *Schillner* view is correct, and that the *Kemper* view is incorrect. But the question as to the proper interpretation of Section 12 (2) of the 1933 Act is not before this Court.

³⁷ *Moore v. Gorman*, 75 F. Supp. 453 (S. D. N. Y. 1948), follows the *Schillner* view. *Siebenthaler v. Aircraft Accessories Corp.*, CCH Fed. Sec. L. Rep., ¶ 90, 112 (W. D. Mo. 1940), is in accord with the *Kemper* view. In addition, there are passing dicta in *Independence Shares Corp. v. Deckert*, 108 F. 2d 51 (C. A. 3, 1939), rev'd on other grounds, 311 U. S. 282 (1940), and *Murphy v. Cady*, 30 F. Supp. 466 (D. Me. 1939), favorable to the narrow view. As distinguished from the *Schillner* case, in which a well-reasoned opinion was handed down, none of the opinions in the cases favoring the narrow view contains any analysis of this interpretative problem.

The different language of Rule X-10B-5 does not give rise to such a controversy. Following the jurisdictional language of Section 10 (b) itself, Rule X-10B-5 provides:

It shall be unlawful for any person, *directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,*

(1) *to employ any device, scheme, or artifice to defraud,*

(2) etc. * * *

(3) etc. * * *

in connection with the purchase or sale of any security. [Emphasis supplied.]

Section 17 (a) of the 1933 Act, upon which the Rule is patterned, contains similar language. It seems clear from this language that it is sufficient if the mails or facilities of interstate commerce are used *in connection with* the fraudulent purchase or sale, and that it is not necessary, as defendants contended below, that the misleading statements be communicated by means of these instrumentalities. It should also be considered that Rule X-10B-5 applies, *inter alia*, to fraudulent securities transactions in which there may not be any affirmative misrepresentations, but where the fraud stems from active concealment of material facts or the non-disclosure of such facts where there is a legal duty to disclose. Defendants' view of the jurisdictional language of Rule X-10B-5 would have the effect of eliminating these common frauds from the coverage of the statute; for in such cases the court would be without jurisdiction

because of the absence of any misleading statements which could be communicated by mail or through interstate facilities. This further illustrates the basic invalidity of defendants' contention.

So far as we know, no court has ever imposed such a limitation on either Rule X-10B-5 or Section 17 (a) of the 1933 Act. On the contrary, mailings connected with a fraudulent securities transaction which do not involve the transmittal of any misrepresentations or statements of half-truths have consistently been upheld by the courts under these provisions, including the Court of Appeals for the Seventh Circuit, which in the *Kemper* case held to the contrary under Section 12 (2), and the Court of Appeals for the Third Circuit, which has expressed a contrary dictum under Section 12 (2).³⁸ Thus, mailings acknowledging part payment and transmitting deeds were held sufficient by the Court of Appeals for the Seventh Circuit in *U. S. v. Earnhardt*, 153 F. 2d 472 (1946), *cert. denied*, 328 U. S. 858 (1946). In *U. S. v. Monjar*, 47 F. Supp. 421 (D. Del. 1942), affirmed by the Court of Appeals for the Third Circuit, 147 F. 2d 916 (1943), *cert. denied*, 325 U. S. 859 (1945), mailings by defendants' agents to defendants containing reports of the success of meetings held to obtain money from victims, and remitting cash statements and bank drafts, were also held sufficient. In *Slavin v. Germantown Fire Ins. Co.*, 174 F. 2d 799 (C. A. 3, 1949), the principal defendant had purchased shares of a new issue of stock sold by an insurance company which had just been converted from a mutual to a

³⁸ See n. 37, *supra*.

stock company. It was alleged that, by concealing material facts from the board of directors of the insurance company as to the probable extent of policy holder participation in the purchase of these new shares, this defendant had been in large measure responsible for the company's action in converting to a corporation from which he ultimately benefited. He never used the mails himself; but the insurance company, to effectuate the conversion, did use the mails to send out notices of a stockholders' meeting held to approve the conversion plan, and to send out proxy forms. Subsequently, prospectuses were distributed by the company through the mails. Subscription warrants were also sent through the mails. The District Court dismissed a complaint under Rule X-10B-5 for lack of sufficient use of the mails to provide jurisdiction. 74 F. Supp. 876 (E. D. Pa. 1947). On appeal the defendant conceded that there was jurisdiction, but argued that no fraud had been shown. In a split decision, the Court of Appeals for the Third Circuit held that a "last minute" disclosure by this defendant absolved him from the charge of fraud. The mailing question is discussed more fully in the dissenting opinion of the chief judge. 174 F. 2d, at 810, 814.

Other examples of mailings which have been held sufficient, including mailings of the type alleged in the instant complaint, are as follows: delivery by mail of a stock certificate after the contract of sale was concluded orally and the stock paid for;³⁹ mail-

³⁹ *S. E. C. v. Wimer*, 75 F. Supp. 955 (W. D. Pa. 1948). See also *U. S. v. Ryan*, 2 S. E. C. Jud. Dec. 423 (S. D. Fla. 1941) (delivery of whiskey warehouse receipts pursuant to executory contract).

ings of warranty deeds between defendants, and to the county clerk for recording and subsequent delivery to investors;⁴⁰ mailings of confirmation slips;⁴¹ a mailing requesting delivery of securities to a third person and a reply by mail stating that this had been done;⁴² and a mailing by a bank to effect collection of a check representing the receipts of defendant's fraud.⁴³ As a court in this circuit has stated, "the character of the matter sent by mail is immaterial" where the mailing is connected with the fraudulent sale.⁴⁴

III

A private civil action may be maintained for the violation of Rule X-10B-5

In the court below defendants also argued that, since no private action is expressly provided by the 1934 Act for a violation of a rule under Section 10 (b), a violation of Rule X-10B-5 can give rise only to action by the government, and cannot afford a private person who has been injured by the violation the right to maintain an action for damages or other relief.

⁴⁰ *Mansfield v. U. S.*, 155 F. 2d 952 (C. A. 5, 1946), *cert. denied*, 329 U. S. 792 (1946).

⁴¹ *U. S. v. Kopald-Quinn & Co.*, 1 S. E. C. Jud. Dec. 371 (N. D. Ga. 1937), *aff'd*, 101 F. 2d 628 (C. A. 5, 1939), *cert. denied*, 307 U. S. 628 (1939); *Kaufman v. U. S.*, 163 F. 2d 404 (C. A. 6, 1947), *cert. denied*, 333 U. S. 857 (1948); *U. S. v. Guaranty Underwriters, Inc.*, S. D. Fla., No. 7155-J-Cr., Oct. 3, 1944, 3 S. E. C. Jud. Dec. 240.

⁴² *Bogy v. U. S.*, 96 F. 2d 734 (C. A. 6, 1938), *cert. denied*, 305 U. S. 608 (1938).

⁴³ *U. S. v. Vidaver*, 73 F. Supp. 382 (E. D. Va. 1947).

⁴⁴ *S. E. C. v. Timetrust, Inc.*, 28 F. Supp. 34, 42 (N. D. Calif. 1939).

This contention was properly rejected by the court below (Tr. 41).

Considering the fact that the right to maintain a private action for the violation of Rule X-10B-5 has been unanimously upheld by a great number of courts, and that we are not certain at this time as to the extent to which it will be an issue in this appeal, we do not propose to reargue the question in detail in this brief. Should appellees present an argument on this question which would warrant additional comment on our part, we shall do so in a reply brief.

The implied right of private action under Rule X-10B-5 has been predicated primarily upon basic tort law that a person who has been injured by another's violation of a statute intended for his protection, or for the protection of a class of which he is a member, may maintain a civil action for private relief, provided that the statute itself does not withhold such relief or make other provisions for private relief inconsistent with the application of this tort doctrine. *Restatement of Torts*, vol. 2, § 286; *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513-514 (E. D. Pa. 1946).⁴⁵ There is, in addition, Section 29 (b) of the 1934 Act, 15 U. S. C. § 78cc (b), which

⁴⁵ The earlier case of *Baird v. Franklin*, 141 F. 2d 238 (1944), cert. denied, 323 U. S. 737 (1944), involving Section 6 (b) of the Act, 15 U. S. C. § 78f (b), provided strong authority for the application of this doctrine. In that case the Court of Appeals for the Second Circuit agreed that a private action could be maintained for violation of Section 6 (b), for which there is similarly no express provision authorizing a private action. Plaintiffs lost the *Baird* case only because they had failed to sustain the burden of proving their damages. See, particularly, the opinion of Judge Clark, 141 F. 2d, at 245.

provides that any contract made in violation of the Act shall be void as respects the rights of the violator. Because of the limited scope of the express civil liabilities provisions of the 1934 Act,⁴⁶ and the provisions of Section 29 (b) (particularly an amendment thereto in 1938) which indicate that Congress assumed that private actions could be maintained for the violation of many of the provisions of the 1934 Act which do not expressly authorize private recovery,⁴⁷

⁴⁶ Private actions are expressly authorized by Sections 9 (e), 16 (b), and 18 (a) of the 1934 Act, 15 U. S. C. §§ 78i (e), 78p (b), 78r (a). These provisions, however, deal with only a small part of the field covered by this Act. The substantive right of action authorized by each of these sections, to a large extent, is one unknown to the common law; and each contains special procedural provisions, including a relatively short statute of limitations. Congress may have legislated in detail with respect to these sections for the purpose of imposing circumscriptions which it did not want imposed on other private actions under the statute. See *Baird v. Franklin*, 141 F. 2d 238, at 245 (C. A. 2, 1944), *cert. denied*, 323 U. S. 737 (1944). Under the circumstances, the maxim "expressio unius est exclusio alterius" (upon which defendants relied in the court below) has been subordinated to what has been regarded as the statutory policy not to obstruct application of the basic tort doctrine. See the *Kardon* case, 69 F. Supp., at 514, and the *Baird* case, 141 F. 2d, at 245. Supreme Court authority for so subordinating the quoted maxim is found in *S. E. C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344, at 350 (1943).

⁴⁷ The 1938 amendment to Section 29 (b), 52 Stat. 1076, provided, *inter alia*, a short statute of limitations with respect to actions for the violation of Commission rules under Section 15 (c) (1), which, like Section 10 (b), does not expressly authorize a private action. This has been regarded as giving additional support for the right to maintain an action for the violation of Rule X-10B-5; for, by implication, the amendment suggests that Congress always assumed the availability of private actions under Section 15 (c) (1) and similar provisions such as Section 10 (b).

the courts have had no difficulty in upholding the right of a defrauded seller of securities to maintain a private action for the violation of Rule X-10B-5. For a comprehensive discussion, see the *Kardon* opinion, *supra*, and the comment in 59 Yale L. J. 1120, at 1133 *et seq.*, to which we have previously referred.

We set forth below some of the many cases in which the right to such private action has been upheld or recognized:

Fischman v. Raytheon Mfg. Co., 188 F. 2d 783 (C. A. 2, 1951);

Slavin v. Germantown Fire Ins. Co., 174 F. 2d 799 (C. A. 3, 1949);

Kardon v. National Gypsum Co., 69 F. Supp. 512 (E. D. Pa. 1946);

Robinson v. Difford, 92 F. Supp. 145 (E. D. Pa. 1950);

Speed v. Transamerica Corp., 71 F. Supp. 457 (D. Del. 1947), and 99 F. Supp. 808 (D. Del. 1951);

Osborne v. Mallory, 86 F. Supp. 869 (S. D. N. Y. 1949);

Hawkins v. Merrill Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104 (W. D. Ark. 1949);

Fry v. Schumaker, 83 F. Supp. 476 (E. D. Pa. 1947).

Not only has no court ever denied the right of private action for the violation of Rule X-10B-5 but, on the contrary, the underlying rationale has been applied to permit private lawsuits for violations of other provisions of the federal securities laws which similarly contain no express authorization for such actions: see, *e. g.*, *Remar v. Clayton Securities Corp.*, 81 F. Supp. 1014 (D. Mass. 1949), *Appel v. Levine*,

85 F. Supp. 240 (S. D. N. Y. 1948), and *O'Connell v. Mallory*, CCH Fed. Sec. L. Rep. ¶90,445 (S. D. N. Y. 1949) [Regulations T and U under Section 7 of Securities Exchange Act of 1934]; *Osborne v. Mallory*, 86 F. Supp. 869 (S. D. N. Y. 1949) [Section 17 (a) of the 1933 Act; Section 15 (c) (1) of the 1934 Act and Rule X-15C1-2 thereunder]; *Hawkins v. Merrill Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104 (W. D. Ark. 1949) [Sections 11 (d) and 17 (a) of the 1934 Act, and Rule X-17A-5 thereunder]; *Fischman v. Raytheon Mfg. Co. et al.*, 188 F. 2d 783 (C. A. 2, 1951) [Section 17 (a) of the 1933 Act, dictum].⁴⁸

IV

The applicable statute of limitations for a Rule X-10B-5 action for damages is that of the state of the forum

Defendants' contention that the action is barred by the statute of limitations was also rejected by the court below (Tr. 41). We express no opinion on the propriety of that ruling; for the question involves the construction of state law with respect to which we claim no expertise.

We confine ourselves merely to the observation that there is no federal statute of limitations in the 1934 Act, or elsewhere, applicable to a private action for damages based on a violation of Rule X-10B-5, and

⁴⁸ In so referring to the *Osborne* and *Fischman* cases in this string of citations which we have set forth for the information of the Court, we do not wish to be understood as taking the view that the same rationale can properly be applied so as to provide an implied private right of action for the violation of Section 17 (a) of the 1933 Act. This question is not involved here, and we express no opinion on it.

that the federal rule in such a case requires the court to apply the statute of limitations of the state of the forum. *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783, 787 (C. A. 2, 1951); *Osborne v. Mallory*, 86 F. Supp. 869, 879 (S. D. N. Y. 1949). See also *Cope v. Anderson*, 331 U. S. 461, 463 (1947); *Burnham Chemical Co. v. Borax*, 170 F. 2d 569, 576 (C. A. 9, 1948); *Caldwell v. Alabama Dry Dock and Shipbuilding Co.*, 161 F. 2d 83, 85 (C. A. 5, 1947), *cert. denied*, 332 U. S. 759 (1947); *Williamson v. Columbia Gas & Electric Corp.*, 110 F. 2d 15, 16 (C. A. 3, 1939), *cert. denied*, 310 U. S. 639 (1940). The appropriate reference, in the instant case, is the local law of the State of Washington.

CONCLUSION

Assuming that the action is not barred by the applicable statute of limitations, we believe that the judgment below dismissing the action should be reversed.

Respectfully submitted.

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DECEMBER 1951.

APPENDIX A

ANALYSIS OF EXCERPTS FROM LEGISLATIVE HISTORY RELIED UPON BY DEFENDANTS BELOW

For our discussion of the original Section 15 of the Act, with which the following excerpts are concerned, we refer the Court back to pp. 44–49 in the main portion of this brief.

(1) *Statement by Representative Rayburn* (78 Cong. Rec. 7419):

In Section 3 of the Bill, we set forth the definitions; and I shall insert in the Record at this point some further definitions of terms which may be used in connection with the discussions of the bill * * *

* * * * *

“Over-the-counter market,” as used in this bill, refers to *a market maintained off a regular exchange by one or more dealers or brokers. The market must be maintained both for the purchase and sale of the securities in question. A dealer or broker who merely undertakes a request to find a purchaser for a person who wants to sell or to find a seller for a person who wants to buy, would not usually be considered to be creating a market. But the dealer who normally is willing to quote “a market,” i. e., both the price at which he will buy and the price at which he will sell, is creating an over-the-counter market.* [Emphasis ours.]

Comment: Mr. Rayburn was discussing only the scope of the regulation provided by the original (but since repealed) provisions of Section 15 of the Act with respect to the two-way over-the-counter markets in particular securities made or created by brokers

and dealers. He did not purport to discuss the limitations of the bill as a whole. In the quoted excerpt, Mr. Rayburn emphasized that creating an over-the-counter market in a particular security, within the meaning of the regulation authorized by the original Section 15, required two-way quotations—*i. e.*, quotations of both bid and asked prices for the security in question. As we have already pointed out, pp. 45–48, *supra*, the Act as originally passed did not authorize regulation of the nonexchange activities of brokers and dealers generally, but only of the special two-way over-the-counter markets in particular securities which they made or created. The catch-all provisions of Section 10 (b) were relied upon as a general deterrent against fraud.

(2) *Statements in Senate and House Committee Reports:*

(a) *Senate Statement* (Sen. Rep. No. 792, 73d Cong., 2d Sess., p. 6):

In addition to the organized security markets there exist in financial centers unorganized “over-the-counter” markets where *securities are bought and sold in large volume*. Many of these securities are of a conservative character, such as Government, State and Municipal bonds which are exempted from the provisions of the bill; but others are more speculative in nature and are *subject to the abuses of manipulation*. For example, the Committee has heard of extensive manipulation in certain New York bank stocks after their withdrawal from the New York Stock Exchange and while they were being sold “over-the-counter”. These manipulations resulted in tremendous losses to the investing public, and in enormous profits to insiders. *It has been deemed advisable to authorize the Commission to subject such activities to regulation similar to that prescribed for transactions on organized exchanges.* This

power is vitally necessary to forestall widespread evasion of stock exchange regulation by the withdrawal of securities from listing on the exchanges, and by transferring trading therein to “*over-the-counter*” markets where manipulative evils could continue to flourish, unchecked by any regulatory authority. Since the necessity for regulation of “*over-the-counter*” markets will depend largely on the extent to which activities prohibited on exchanges are transferred to such markets, *provision for their regulation* has been made as flexible as possible. [Emphasis ours.]

Comment: This paragraph appears in a section of the Senate report dealing with “Registration of Exchanges.” It pointed to the need for supplementing the regulatory provisions of the bill respecting exchanges with provisions for the regulation of comparable “*over-the-counter*” markets in particular securities which brokers and dealers may create or make, and where manipulation may also occur.¹

(b) *House Statement* (H. R. Rep. No. 1383, 73d Cong., 2d Sess., pp. 15-16):

The Committee has been convinced that effective regulation of the exchanges requires as a corollary a measure of control over the “*over-the-counter*” markets. The problem is clearly put in the recent report of the Twentieth Century Fund on “stock market control”:

“The benefits that would accrue as the result of raising the standards of security exchanges might be nullified if the *over-the-counter* markets were left unregulated and uncontrolled. They are of vast proportions and they would serve as a refuge for any business that might

¹ For an example of manipulation in an *over-the-counter* market which a broker-dealer had made for one security, see *In re M. S. Wien & Co.*, Securities Exchange Act of 1934, Release No. 3855 (1946).

seek to escape the discipline of the exchanges; and the more exacting that discipline, the greater the temptation to escape from it. Over-the-counter markets offer facilities that are useful under certain conditions, but they should not be permitted to expand beyond their proper sphere and compete with the exchanges for business that, from the view of the public interest, should be confined to the organized markets. This constitutes the sanctions for federal regulation of over-the-counter dealers and brokers. To leave the over-the-counter markets out of a regulatory system would be to destroy the effects of regulating the organized exchanges."

Comment: The above paragraph, including the quotation from the Twentieth Century Fund publication, appears in a section of the House report dealing with "Control of the Exchanges and Over-the-Counter Markets." The subject of discussion was the same as that involved in the above excerpt from the Senate report, namely, the need for supplementing regulation of the stock exchanges with regulation of the somewhat comparable nonexchange markets made or created by brokers and dealers. The scope of other provisions, such as the general antifraud section in question, was not involved.

(3) *Statements of Representative Maloney:*

If one wants to put effective restraints upon excessive speculation on the exchanges, it is obviously necessary to guard against the same sort of excessive speculation on the unregulated markets. But those who tell you that the over-the-counter provisions of the bill will interfere directly with the small industrial concern are either wilfully misleading you or are ignorant of what the bill really does. The control of the Commission with respect to the over-the-counter markets may be exercised *only over*

dealers or brokers who maintain a public market. The Commission has no power to cause any corporation to file any statement or to subject itself in any way to regulation. *Even the dealer or broker is not subject to control if he does no more than to try to find a buyer for a person who wants to sell some shares or to find a seller for a person who wants to buy some shares.* A dealer or broker creates or maintains an over-the-counter market as it is defined in the bill *only if he stands ready both to buy and sell*; that is, if he stands ready to quote you a price at which he will buy your shares as well as a price at which he will sell your shares (78 Cong. Rec. 7868). [Emphasis ours.]

This bill is primarily designed to prevent a manipulation of securities—the kind of manipulation that threatened the lives of the insurance companies of America, and thereby the humble estates men endeavored to create by the sweat of the brow and real self sacrifice. It would remove a chance at manipulation that not only threatened the banking system of the country but actually left many banks broken wreckage upon the rocks. It would forever forbid a manipulation that boiled a market to the point where it attracted credit away from the proper channels of industry into uncertain paths of speculation (*Id.*, p. 7869).

Comment: As is obvious from the text, Mr. Maloney, like Mr. Rayburn, was discussing the scope of the regulation authorized by the original Section 15, and the “control” which the bill proposed to give the Commission with respect to over-the-counter markets in securities made or created by brokers and dealers. Again, the general anti-fraud provisions of Section 10 (b) were not involved.

(4) *Statement of Representative Mapes* (78 Cong. Rec. 7711):

And the only provision in the bill that relates to small or local corporations in that respect, as I understand it, is the one in the over-the-counter market section, which gives the * * * Commission authority in its regulations of dealers and brokers in the over-the-counter markets to require that such dealers and brokers cease to handle the securities of any corporation unless they are listed with them, but in no case is a corporation required to so list unless it see fit to do so.

Comment: This statement was in answer to a question by Representative Merritt as to whether the bill would give the Commission power to compel every corporation to list for trading. Mr. Mapes referred to the proposed regulation of the markets in particular securities created by brokers and dealers, which we have already discussed, and expressed the view that, so far as the problem of listing was concerned, the small local corporations mentioned by Mr. Merritt could be affected only by these provisions. The statement has no relevancy to the instant question.

(5) *Statement of Senator Steiwer* (78 Cong. Rec. 8189):

I merely want to make a suggestion. It is not appropriate, in order to calm the fears of those who now raise the question as to the inclusion of small intrastate corporations, to say to them that the bill by its terms does not and cannot reach such corporations. In the first place, this bill deals with stock exchanges, and with the regulation of the over-the-counter market. The very least corporation, if it should seek to list its stock upon the stock exchange, would be obliged to comply with this proposed law. That might be so even though it was an intrastate institution, because the stock exchange may be engaged in an inter-

state business and the intrastate operation comes in quite incidentally.

I think, therefore, the very least corporation might subject itself to regulation under this proposed act if it should seek to sell its securities over-the-counter. But unless the stock crosses the threshold of one of these institutions or the other, it is not affected by the proposed law, whether it be a big institution or a little institution.

Comment: Senator Steiwer's observation that small intrastate corporations would not be affected by the listing requirements of the proposed Act unless they sold on an exchange or "over-the-counter" obviously had reference in the latter regard to the proposed provisions of the original Section 15, which, as we have already pointed out, empowered the Commission to promulgate listing requirements for securities traded on the over-the-counter markets made or created by brokers or dealers.

(6) *Statement by Representative Rayburn* (78 Cong. Rec. 7701):

The Commission also has power to *regulate* the over-the-counter markets, but in so doing they can only regulate the brokers or dealers who *create* a public market for *both the purchase and sale* of such securities, and cannot compel corporations not interested in having a public market for their shares to file any statements or submit to any regulation. [Emphasis ours.]

Comment: Again Mr. Rayburn was discussing the scope of the regulatory provisions of the original Section 15, not the scope of the Act as a whole.

(7) *Colloquy between Senators Dill and Barkley* (78 Cong. Rec. 8190):

Mr. DILL. The Senator is a lawyer and he knows that lawyers can make words mean al-

most anything. If it is the intent of this bill not to include corporations whose stock is not so registered on an exchange or not dealt in over the counter, of course, if that is the intent, he, as a legislator, only has to write it in the bill so that there cannot be any question.

Mr. BARKLEY. Section 2 of the bill itself says that only those are included in the proposed law. Why should any one imagine that someone else will be included in it?

Comment: Senator Dill had inquired whether it was true that, under the proposed statute, "corporations of all kinds with any established interstate business will be required to make reports to the Commission" (*ibid.*). Senator Barkley replied that, if the corporation's securities were not sold on an exchange or in the over-the-counter markets (*i. e.*, those made by brokers and dealers and subjected to Commission regulation under the proposed Section 15), no reports could be required. Senator Dill thereupon suggested a specific amendment to that effect, in response to which Senator Barkley made the above quoted statement to the effect that the bill already made it clear who would be affected by the regulatory provisions in question. Senator Byrnes thereupon entered the discussion to explain the scope of the proposed Section 15 and to state that he had no objection to a clarifying amendment if carefully drawn to exclude purely intrastate sales (*ibid.*).

APPENDIX B

COMMENT UPON STATEMENTS BY COMMISSION OFFICIALS QUOTED BY DEFENDANTS BELOW

Defendants quoted from (1) an address in 1944 by the later Edward H. Cashion when he was Counsel to the Commission's Corporation Finance Division, (2) a casebook prepared in 1947 by Louis Loss, the Commission's present Associate General Counsel, who is representing the Commission in the instant case, and (3) a statement in the Commission's 14th Annual Report.

(1) *Excerpt from Mr. Cashion's speech:*

The Securities and Exchange Act of 1934 and its subsequent amendments were designed to regulate trading in securities—the purchase and sale of securities—on national securities exchanges and in over-the-counter markets, and to regulate brokers and dealers. The act and its amendments were designed to strengthen the fraud prevention and disclosure provisions of the prior act. (Cashion, address entitled, “*Fraud on the Seller of Securities*,” published in Proceedings of Twenty-Seventh Annual Convention of National Association of Securities Commissioners (1944), 109, at 110.)

Comment: We do not understand what succor defendants derive from this statement. In the very same paragraph immediately following the quoted excerpt, Mr. Cashion went on to say—

One step in that direction was the promulgation of a Rule by the Commission, now known as Rule X-15C1-2, adopted pursuant to Section 15 (c) of the 1934 Act. That Rule prohibits fraud by brokers and dealers in either the sale

or purchase of securities. Another loophole, however, was still to be closed in the protections administered by the Commission. The step to close that loophole was taken in May 1942 when the Commission, acting pursuant to Sections 10 (b) and 23 (a) of the Act, adopted Rule X-10B-5. This Rule embodies the broad anti-fraud provisions of Section 17 (a) of the 1933 Act, and specifically prohibits fraud by *any person* in connection with the *purchase or sale* of securities. [*Ibid.* Emphasis that of Mr. Cashion.]

Earlier in his address, Mr. Cashion pointed out that—

* * * the Securities Act of 1933, was designed to bring about adequate disclosure of the nature of securities to be offered for sale to the public and to prevent fraud in their distribution or sale. *Although certain securities and certain security transactions are exempted from the registration provisions of that Act, there are no exemptions from its anti-fraud section, Section 17 (a).* [*Ibid.* Emphasis ours.]

We have already pointed out that the pattern of the Securities Exchange Act of 1934 is similar. See pp. 25, 29, *supra*.

(2) *Excerpt from the Loss casebook:*

The over-the-counter markets, in general, are the unorganized markets in which there are meetings of individual supply and demand as contrasted with the organized markets or exchanges where there are meetings of collective supply and demand. Over-the-counter transactions take place in the offices of brokers and dealers and do not involve the trading facilities of an exchange. (Loss, "*Cases and Materials on SEC Aspects of Corporate Finance*," 1947, p. 119.)

Comment: This is not Loss's statement, but a paragraph from this Commission's "Report on the Feasibility and Advisability of the Complete Segregation of the Functions of Dealer and Broker" (1936), quoted in Loss's chapter on "Regulation of the Over-the-Counter Market and Investment Advisers." As indicated by its title, the report deals with a specific regulatory problem respecting brokers and dealers. The quoted paragraph, taken in the context of the paragraphs which follow in the report, purports merely to distinguish the broker-dealer over-the-counter market from the exchange market, and does not purport to describe the full scope of the over-the-counter market. On the contrary, the recently published treatise by Loss takes the same position that is maintained in this brief. See Loss, *Securities Regulation* (1951), pp. 709, 840-41.

(3) *Excerpt from the Commission's 14th Annual Report* (1948), p. 24:

The Securities Exchange Act of 1934 is designed to eliminate fraud, manipulation, and other abuses in the trading of securities both on the organized exchanges and in the over-the-counter markets, which together constitute the Nation's facilities for trading in securities; to make available to the public information regarding the condition of corporations whose securities are listed on any national securities exchange; and to regulate the use of the Nation's credit in securities trading.

Comment: Again, we have been unable to discern anything in this generalized statement which lends any support to the defendants. On the contrary, the quoted excerpt only serves to emphasize the broad remedial scope of the present statute.

No. 13111

**In the United States Court of Appeals
for the Ninth Circuit**

IDALIA O. FRATT, APPELLANT

v.

**JOHN R. ROBINSON AND JANE DOE ROBINSON,
HUSBAND AND WIFE, ET AL., APPELLEES**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION**

**REPLY BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION, AMICUS CURIAE**

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FILED

JAN 17 1952

PAUL D. O'BRIEN

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

Our main brief, we believe, adequately answers the various arguments proffered by appellees. We desire to comment, however, on the quotations from the *Barrett* opinion and the *Meyer* treatise, which are set forth in appellees' brief but which did not appear in defendants' briefs below.

First: On page 16 of their brief appellees assert that the Commission's present position as to the scope of the over-the-counter market is "absolutely contrary" to the view which it expressed in 1941 in the case of *In the Matter of Barrett & Co.*, 9 S. E. C. 319, at 323. Portions of the *Barrett* opinion are quoted on pages 76-77 of appellees' brief. If the quoted text is read in light of the context of the opinion it will

readily be apparent that the Commission was describing the markets in particular securities made or created by brokers and dealers specializing in those securities, and the mechanics of quoting in these specialized markets, so as to provide the reader with the factual background necessary to an understanding of the over-the-counter manipulation with which that case was concerned. It should be recalled that because of the opportunities for manipulation in these specialized broker-dealer markets Congress, in the *original* provisions of Section 15 of the 1934 Act, authorized the detailed regulation of these markets although it postponed until the 1936 and 1938 amendments its full statutory program with respect to the regulation of other broker-dealer transactions and activities.

Second: On pages 74–75 appellees quote from Meyer, *The Securities Exchange Act of 1934, Analyzed and Explained* (published in 1934), pp. 106–107. Like many other excerpts quoted by appellees, this one, too, deals with the scope of the *original* (but since *repealed*) provisions of Section 15, with which we have already dealt at length. Earlier, at page 85 of his treatise, in discussing Section 10, Meyer observed: “Persons affected by this section are all who use the facilities of an exchange or the mails or interstate commerce.”

The basic fallacy in the contention which appellees have predicated on these quotations—as in their entire argument with respect to the limited scope of Section 10 (b)—is their unfounded assumption that the general anti-fraud provision of the 1934 Act was some-

how intended to be narrower in scope than its analogue in Section 17 (a) of the Securities Act of 1933 in that it was meant to apply only to securities traded in the organized markets, whatever they may be. We have no quarrel with the excerpts from various sources quoted by appellees which describe the over-the-counter market as applied to the trading activities of professional brokers and dealers. Most of the trading in securities which is conducted off the exchanges does take place, of course, in this more or less organized portion of the over-the-counter market. Apart from the invalidity of appellees' contention that nonprofessional transactions are not effected in the "over-the-counter market," that term is not employed in Section 10 (b) and there appears to be no need for the Court to define it in this case. Our view of Section 10 (b) is based on the plain language of that section and what appears to us to be the obvious purpose of Congress—that Section 10 (b) of the 1934 Act, like Section 17 (a) of the 1933 Act, was intended to be universal in scope, with no exemptions whatsoever, provided only that there has been use of the mails or channels of interstate commerce.

Respectfully submitted.

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JANUARY 1952.

IN THE
United States Court
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IDALIA O. FRATT,

Appellant,

vs.

JOHN R. ROBINSON and JANE DOE
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al,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
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APPELLEE'S PETITION FOR RE-HEARING

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APPELLEES' PETITION FOR RE-HEARING

Apellees above named respectfully petition this Honorable Court for a re-hearing of the appeal of the above entitled cause and in support of their position represent to the Court as follows:

We reserve our argued position as to each of the points of appeal, but in this Petition address ourselves solely to that feature of the case which, in our opinion, effects a national public interest and which we believe the Court may be convinced that its result is based upon the application of incorrect legal principles.

Therefore, we limit our discussion to that phase of the case discussed on pages 3 to 7, of the Opinion, under the caption,

“ARE THE ALLEGED FACTS OUTSIDE THE PURVIEW OF THE ACT?”

The decision in the instant case is of national public interest in that it affects the millions of persons buying and selling stocks and other securities. It is the only appellate decision passing upon the question of whether the Securities and Exchange Act of 1934 applies only to securities that at some time have been traded in or upon the over-the-counter markets or whether, to the contrary, the Act is broad enough in its scope (as the Court has now held) to cover all securities sales and transactions, including the isolated “over-the-fence” sales of stock in small family corporations where such

stock has never before, at any time, been traded upon any organized market.

It is the only appellate decision passing upon the important and far reaching question of whether the Securities and Exchange Commission, pursuant to the Act, has regulatory powers (as this Court has now indirectly held) over all stock transactions in the United States without limitation or whether the Commission's power is limited by the Act only to the regulation of securities that at some time have been traded in or upon securities exchanges or over-the-counter markets.

As this Court well knows there are millions of individual investors in the United States owning shares of stock in small, closely held, family corporations where such stock has never in its history crossed the threshold of a national securities exchange or an over-the-counter market.

The decision in this case is of great import to these millions of investors in such corporations in that it has now been held by an appellate court for the first time that such isolated sales are covered by the Act and *a fortiori* are likewise under the regulation of the Securities and Exchange Commission.

Also, the decision greatly affects the operation of the Commission because, as has already been said, it defines the regulatory powers of the Commission and broadens and increases these powers beyond what, we think, was the plain intent of Congress.

Because of the national importance of this question, its effect upon the many stockholders in small corporations, its determinative effect as to the regulatory jurisdiction of the Securities and Exchange Commission and, because we believe that the Court reached a wrong result, we respectfully urge that the Court, in the public interest, re-examine its position.

The opinion filed in the instant case adopts and approves the major premise of appellees that Congress, by the enactment of the Securities and Exchange Act of 1934, only intended, as said in Section 2 of the act, to regulate "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets," because on page 5 of the opinion it is said:

"We think the whole tenor of the Act indicates that its operative procedure is by regulation of security-transfer businesses and persons who function in or through them."

The Court further adopts and approves appellees' second premise that the expression "over-the-counter" alludes to established businesses or brokers who handle security transfers off the regular stock exchanges and does not include the transfer of securities made without the aid of any intermediaries. On page 5 of the opinion it is further said:

"That 'stock exchange' and 'over-the-counter markets' mean, in the Act, any security-transfer business wherein the business of marketing securities is conducted. *We think the authors of the Act*

realized that the remedy of the abuses sought to be applied by the Act would be more or less completely effective in the proportion of security-trading done on or through the established businesses.”
(Emphasis ours)

The Court completely rejected the argument or premise of the appellant and the Commission, as Amicus Curiae, that “over-the-counter” embraces every security not traded through a legal exchange, and further rejected appellant’s theory that since in the preamble of the Act both expressions “securities exchange” and “over-the-counter market” are used, the two embrace every security transaction without limit. At page 5 of the opinion the Court definitely rejected appellees’ premise in this regard when it said:

“By what may seem to be a paradox we agree with the conclusion reached by appellant and the Commission while, *in general, disagreeing with their premise*; and we disagree with the conclusions reached by appellees while, *in general, agreeing with their assigned premise.*” (Emphasis ours)

At this point it is important to note that when the Court rejected appellant’s premise in this respect the Court also rejected the basis for the holding in *Speed v. Transamerica Corp.*, D. Del., 1951, 99 F. Supp. 803.

After adopting appellees’ premise and rejecting appellant’s premise the Court then decided the case in favor of appellant for reasons which, we think, do not logically or legally follow.

It would appear that the Court reached the conclusion it did because it did not fully understand appellees' argument. The Court definitely seems to be of the opinion that appellees are arguing *that the transaction itself* must have occurred in or on a securities exchange or in or upon an over-the-counter market in order to come within the scope of the Act because on page 4 of the opinion the Court, to our complete surprise, said:

"They (appellees) argue, from such premise, that to come under the Act at all a stock transaction must be through one or another of the established businesses."

THIS IS NOT APPELLEES' ARGUMENT AT ALL. As we said on page 10 of our brief:

"Appellees are not arguing that the act does not apply to a transaction in a security unless the transaction itself took place on a national exchange or an over-the-counter market. If a stock is or was listed on a national exchange, transactions in that stock which take place off the exchange might well affect the price for transactions in that security on the exchange. The same is true of private transactions in a security which is commonly traded 'over-the-counter'."

It has always been appellees' position in this case that if a security has sometime in its history been traded upon a national exchange or an over-the-counter market that the act does apply, and we repeat, does apply, regardless

of whether the particular alleged fraudulent transaction complained of was conducted on said organized markets or not.

As we shall point out later the Court's apparent failure to correctly understand our position, as above set forth, *and the Court's mistaken belief that we were in fact arguing that the transaction itself must take place upon an organized market in order to come within the scope of the Act* has led the Court, in our opinion, to ground its decision upon an entirely unwarranted and unsound premise. We regret and apologize that our position was not made clear in our brief and in oral argument for as we see it, and as we shall presently demonstrate, it was the Court's misunderstanding of our position that led the Court to the conclusion which it reached.

Having mistaken our argument in this respect the Court, in its opinion, seems to hold that Section 10 of the Act must of necessity be held applicable to all securities transactions without limitation because by so holding, the Court has, on page 5 of the opinion, said that:

“ . . . those who desire to promote crooked deals would see little advantage in using devious methods to by-pass the security-dealing business houses under regulation.”

In other words, the Court seems to conclude and bottom its decision upon the proposition that if Section

10 does not apply to every security transaction in the United States without limitation, that persons desiring to commit a fraud in the sale of securities would by-pass the securities exchanges and over-the-counter markets and thus escape the powerful deterrent of the Act and for this reason, says the court, Section 10 must be given this broad and sweeping interpretation in order to make the regulation of the organized securities market complete and effective.

However, had the Court correctly understood our argument at the outset we doubt very much if it would have grounded its decision upon the foregoing reasoning. *It must be clearly understood and remembered that the Act applies to any security that in its history has ever been traded on either a national exchange or an over-the-counter market, regardless of whether the particular fraudulent transaction took place on said markets or not.* Hence, had the Court correctly understood our position in this regard it would have been, in our opinion, most apparent to the court that "crooked deals" could not be promoted by by-passing exchanges and over-the-counter markets because, as we have pointed out, the Act would apply anyway for the reason that the stock involved had at some time in its history heretofore crossed the threshold of such organized markets.

In other words, the Court seems to be of the opinion that unless Section 10 of the Act is held to apply to every stock transaction in the United States without

limitation that the whole grand purpose of the Act to prevent fraud in the organized exchanges and markets would be frustrated in that persons desiring to promote so-called "crooked deals" would by-pass these organized markets and carry on their fraudulent transaction elsewhere. As we have pointed out, the Act applies to any transaction involving any security that heretofore had crossed the threshold of the organized markets regardless of whether the particular fraudulent transaction complained of occurred in or upon one of these organized markets or not. Hence, if one seeks to perpetuate a fraud or "crooked deal" with reference to such a security, said security having a past history in the organized markets, the Act applies regardless of whether the transaction itself actually took place in one of these markets. Thus, it becomes apparent that had the Court, in our opinion, correctly understood our position it would not have grounded its decision upon the proposition that Section 10 must be given a broad and sweeping interpretation "in order that those who desire to promote crooked deals would see little advantage in using devious methods to by-pass the security-dealing business houses under regulation."

In concluding its decision upon this phase of the case the Court on page 6 of the opinion briefly discussed the District Court cases of *Robinson v. Difford*, *Speed v. Transamerica* and *Kardon v. National Gypsum Company* and pointed out that these cases all reached the

same result by different reasoning. Then the Court says:

“There appears to be logic in all of these roads to the common destination. There is one phase common to the reasoning of all cases; Sec. 10 is in aid of the end sought by the Act, to-wit: *the lessening of fraudulent and sharp practices in the securities market.*” (Emphasis ours)

If Section 10 of the Act, as said by the Court, “is in aid of the end sought by the act, to-wit: the lessening of fraudulent and sharp practices in the *securities market*,” (Emphasis ours) then it follows, as night the day, that the Act does not apply to a sale of stock that never in its history has been traded in any “*securities market*.” In other words, if Section 10 is an aid to the lessening of fraudulent practices in the “*securities market*,” how then can it be said that the Act applies to the sale of a security that has never been traded, in its entire history, in any “*securities market*”?

In the end, and regardless of the ingenious arguments of lawyers, it seems to us that the only question to be asked in this case is whether or not from a reading of the entire Securities and Exchange Act of 1934 it can be said, with reasonable certainty, that Congress intended to regulate and control the sale of every single share of stock or other security in the United States. This, to us, is the “nub” of the question.

Assuming that a father owned all of the capital stock in a closely held, family, incorporated butcher shop and

sold a share of stock to his son who desired to become a part owner in the corporation with his father; can it be said from a reading of the entire Act, that Congress intended to regulate this sale and subject the father and son to the jurisdiction of the Securities and Exchange Commission when said share of stock had never been sold in its entire history in any organized market such as a national exchange or over-the-counter market, merely because an instrumentality of interstate commerce such as the mails was used in closing the transaction? We think Congress never intended such a broad coverage.

Keeping in mind that Section 2 of the Act provides in part,

“For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, . . .”,

we again direct the Court's attention to the colloquy which occurred on the Senate floor during debate on the bill between Senator C. C. Dill and Senator Alben Barkley as follows:

“MR. DILL: The Senator is a lawyer and he knows that lawyers can make words mean almost anything. If it is the intent of this bill, not to include corporations whose stock is not so registered on an exchange or not dealt in over-the-counter,

of course, if that is the intent, he, as a legislator, only has to write it in the bill so that there cannot be any question.

“MR. BARKLEY: Section 2 of the bill itself says that only those are included in the proposed law. Why should anyone imagine that someone else will be included in it?” (78 Cong. Recrd, p. 8190).

We are making exactly the same point in this petition for rehearing as was made by Senator Barkley.

In the case now before the Court we are dealing with parties who are both residents of the State of Washington, involved in the sale of stock of a closely held family corporation which stock had never in its entire history been sold or traded in or upon a national exchange or any over-the-counter market. We respectfully submit that Congress, as was so bluntly stated by Mr. Barkley, never intended to regulate such a transaction.

In submitting the within petition we do not think it necessary, or perhaps even proper, to simply duplicate the materials and arguments contained in appellees' brief. However, because the cases of *United States v. Katz*, 271 U. S. 354, 46 S. Ct. 513, 70 L. Ed. 986, (1926), and *United States v. Jin Fuey Moy*, 241 U. S. 394, 36 S. Ct. 658, 60 L. Ed. 1061 (1916) announce principles of statutory construction which are so manifestly applicable, and we think decisive of the case at bar, we again, as an aid to the Court call attention to these cases. In *United States v. Katz*, *supra*, defend-

ants were indicted under the National Prohibition Act which provided: "No person shall manufacture, purchase for-sale, sell or transport any liquor." The Court held, in viewing the statute as a whole, that the above quoted Section only applied to persons authorized by other Sections of the Act to deal in liquor under Government Permit and did not mean "all persons" without limitation. The Court cited *United States v. Jin Fuey Moy* wherein it was there held:

"This Court held that the words 'any person' not registered could not be taken to apply to any person in the United States, but must be read in harmony with the purposes of the Act to refer to persons required by law to register."

In the instant case Section 2 of the Securities and Exchange Act provides in part as follows:

"For the reasons hereinafter enumerated *transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets* are affected with a national public interest which makes it necessary to provide for regulation and control of *such transactions* and practices and matters related thereto." (Emphasis ours)

Thus, Section 2 limits the entire application of the Act to "transaction in securities as commonly conducted upon securities exchanges and 'over-the-counter' markets and practices and matters related thereto."

Section 10 of the act uses the words "any security registered on a National Securities Exchange or any security not so registered."

It seems abundantly clear that the terms "any security registered on a national securities exchange or any security not so registered," as used in Section 10 must be construed in harmony with Section 2 of the Act which limits the application of the entire Act to securities as commonly conducted upon "securities exchanges and over-the-counter markets." Applying the principles of statutory construction announced in the foregoing cases, Section 10 cannot possibly mean any security without limitation, but rather must logically mean any security which Congress was attempting to regulate as spelled out in Section 2.

In conclusion, appellees respectfully submit that in view of the national importance of the instant decision, its effect upon the many stockholders in small corporations, its determinative effect in defining and broadening the regulatory powers of the Securities Exchange Commission, that the Court, in the public interest, should re-examine its position and grant appellees a rehearing.

Respectfully submitted,

O. D. ANDERSON and J. P. HUNTER
Attorneys for all Appellees
Except W. E. Difford.

ALFRED J. SCHWEPPE and
 M. A. MARQUIS,
Attorneys for Appellee,
W. E. Difford.

CERTIFICATE

STATE OF WASHINGTON }
COUNTY OF SNOHOMISH }SS:

J. P. HUNTER, being first duly sworn on oath, deposes and certifies as follows: That he is one of the counsel of record of the appellees above named and makes this certificate in behalf of all counsel and in compliance with Rule number 25 of the Rules of the United States Court of Appeals for the Ninth Circuit; that the within Petition for re-hearing is, in his judgment, well founded and that it is not interposed for delay.

Dated this 30th day of April, 1953.

J. P. Hunter

Subscribed and sworn to before me this 30th day of April, 1953.

[Signature]

Notary Public in and for the State of Washington, residing at Everett, Washington.

No. 13116

United States
Court of Appeals
for the Ninth Circuit.

PALOS VERDES CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JAN 21 1952

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. CLERK

No. 13116

United States
Court of Appeals
for the Ninth Circuit.

PALOS VERDES CORPORATION,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
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NAMES AND ADDRESSES OF ATTORNEYS

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EDWARD R. McHALE,
Assistants U. S. Attorney,

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal
Revenue,
600 U. S. Post Office and Court House
Bldg.,
Los Angeles 12, Calif.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 11417-PH

PALOS VERDES CORPORATION, a Corpora-
tion,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF INCOME TAX

Comes Now the Plaintiff in the above-entitled
action and for cause of action against Defendant,
complains and alleges:

I.

That Plaintiff is a Corporation organized under
and pursuant to the laws of the State of Delaware,
with its principal office and place of business lo-
cated in the City of Wilmington, County of New-
castle, State of Delaware. That at all times herein
mentioned, Plaintiff was and is duly authorized to
transact business in the State of California and has
at all times herein mentioned transacted and is
doing business in the County of Los Angeles, State
of California.

II.

That Harry C. Westover, the Collector of In-
ternal Revenue, Sixth District of California, Los

Angeles, California, to whom the income tax herein-after mentioned was paid in his official capacity as such Collector of [2*] Internal Revenue is not in office at the time of the filing of this action.

III.

That the question involved herein is one arising under the laws of the United States of America providing for internal revenue and more specifically Section 117 of the Internal Revenue Code.

IV.

That in the month of July, 1944, Plaintiff sold to one Snow an unsubdivided portion of Plaintiff's real property in the County of Los Angeles, State of California, for the sum of \$90,000.00. Said real property had a cost basis to Plaintiff of the sum of \$23,636.93, resulting in a profit or gain of \$66,363.07. That during the fiscal year of Plaintiff commencing October 1, 1943, and ending September 30, 1944, Plaintiff received from said Snow on account of said purchase price of \$90,000.00, the sum of \$27,000.00 and elected, pursuant to Section 44(b) of the Internal Revenue Code to report for income tax purposes said sale upon the Installment Basis. That thereafter, on or about December 15, 1944, Plaintiff filed its Corporation Income and Declared Value Excess Profits Tax Return for its fiscal year ended September 30, 1944, with Harry C. Westover, Collector of Internal Revenue, Los Angeles, California, for the 6th District of California, and

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

thereafter paid to said Collector of Internal Revenue the sum of \$17,066.36 as Income and Declared Value Excess Profits Tax for said fiscal year. That Plaintiff erroneously reported on said Income and Declared Value Excess Profits Tax Return the sum of \$19,908.22, the reportable gain derived from said sale during said fiscal year ended September 30, 1944.

That Plaintiff failed to report said gain of \$19,908.22 as a gain from the sale of capital assets of Plaintiff as provided in Section 117 (a) (10) of the Internal Revenue Code and/or as a gain from the sale of property used in taxpayer's trade or business as provided in Section 117 (j) of the Internal Revenue Code. That as a consequence of Plaintiff's said erroneous report of income in said Income and Declared Value Excess Profits Tax Return for the fiscal year ended September 30, 1944, Plaintiff overpaid to said Collector of [3] Internal Revenue the sum of \$5,467.88 as income and Excess Profits Tax and said sum of \$5,467.88 was erroneously and illegally collected by said Collector of Internal Revenue.

V.

That on or about May 9, 1945, Plaintiff filed its Claim for Refund, a copy of which is attached hereto, marked Exhibit "A" and by this reference incorporated herein, in the sum of \$5,467.88, representing the above-mentioned sum erroneously paid and illegally collected, with Harry C. West-

over, the Collector of Internal Revenue for the 6th District of California.

That on or about October 27, 1946, Plaintiff filed its second Claim for Refund, a copy of which is attached hereto, marked Exhibit "B" and by this reference incorporated herein in the sum of \$5,467.88 representing the above-mentioned sum erroneously paid and allegedly collected, with said Collector of Internal Revenue for the Sixth District of California at his office in Los Angeles, California.

That said Claims for Refund were filed on official form 843 within the time and in the manner provided by law.

VI.

That on or about the 4th day of August, 1949, the Commissioner of Internal Revenue of the United States, rejected and disallowed Plaintiff's said Claims for Refund.

Wherefore, Plaintiff prays for judgment against the Defendant in the sum of \$5,467.88, together with interest thereon from date of payment, and for such other and further relief as the Court deems fitting and proper.

JOHN T. RILEY, and

MARSHALL D. HALL,

By /s/ MARSHALL D. HALL,

Attorneys for Plaintiff. [4]

EXHIBIT A

Form 843

Treasury Department

Internal Revenue Service

(Revised July 1947)

Claim

To be Filed with the Collector Where Assessment
was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse.

☒ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.

☐ Refund of Amount Paid for Stamps Un-
used or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable
to estate, gift, or income taxes).

Collector's Stamp (Date received): Blank.

State of California,

County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Palos
Verdes Corporation.

Business address: R. R. #1, Box #33, Rolling
Hills via. Lomita, California.

Residence:

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed: 6th Dist. of California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Oct. 1, 1943 to Sept. 30, 1944.

3. Character of assessment or tax: Income and Excess Profits Tax.

4. Amount of assessment, \$17,066.36; dates of payment: 12/15/44, 3/15/45, 6/15/45 and 9/15/45.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$5,467.88.

7. Amount to be abated (not applicable to income, gift, or estate taxes):

8. The time within which this claim may be legally filed expires under section of..... (Revenue Act or Internal Revenue Code) on: December 15, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

During the fiscal year ended Sept. 30, 1944, a sale was made of an unsubdivided portion of taxpayers' property to one Snow for \$90,000.00, having a cost basis of \$23,636.93, leaving a profit of \$66,363.07. During the fiscal year taxpayer collected \$27,000.00, principal or 30% of the sale price and elected to report said sale on the Installment Basis—I.R.C. Sec. 44 (b).

Taxpayer erroneously reported returnable

income of \$19,908.22, from said sale as normal tax net income as item 14 in its Corporation Income and Declared Value Excess Profits Tax Return for its fiscal year ended Sept. 30, 1944.

Taxpayer failed to report returnable income of \$19,908.22, from said sale on Schedule C (Form 1120)—Schedule of Capital Gains and Losses as net gain from sale or exchange of capital assets as Item 12(a) from 1120. I.R.C. 117 (a) (10) (A); and taxpayer further failed to calculate alternative taxes on Schedule C (form 1120) I.R.C. 117 (c) (1).

[Seal]

PALOS VERDES
CORPORATION,

/s/ KELVIN C. VANDERLIP.

This return was notarized.

(Seal)

The above claim for refund was prepared by the undersigned upon facts furnished by the taxpayer, which facts I believe to be true and correct.

JOHN T. RILEY. [5]

Tax Calculation

Total Normal Tax and Surtax (Line 27, Page 2, Form 1120).....	\$17,066.36
Alternative Tax and Surtax (Line 29, Schedule C, Form 1120).....	11,598.48

Line 28, Page 2, Form 1120 should have been	11,598.48
Lines 41 and 45, Page 1, Form 1120 should have been.....	11,598.48
Overassessment	5,467.88

EXHIBIT B

Claim

Form 843

Treasury Department

Internal Revenue Service

(Revised July 1947)

To be Filed with the Collector Where Assessment
was Made or Tax Paid

Second Filing of Claim—Original Filed May
9, 1945

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse.

- ☐ Refund of Taxes Illegally, Erroneously,
or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable
to estate, gift, or income taxes).

Collector's Stamp (Date received): Blank.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Palos
Verdes Corporation.

Business address: R. R. #1, Box #33, Rolling
Hills via. Lomita, California.

Residence:

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed:
6th Dist. of California.

2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year) from:
Oct. 1, 1943 to Sept. 30, 1944.

3. Character of assessment or tax: Income and
Excess Profits Tax.

4. Amount of assessment, \$17,066.36; dates of
payment: 12-15-44, 3-15-45, 6-15-45 and 9-15-45.

5. Date stamps were purchased from the Gov-
ernment:

6. Amount to be refunded: \$5,467.88.

7. Amount to be abated (not applicable to in-
come, gift, or estate taxes):

8. The time within which this claim may be
legally filed expires, under section of
(Revenue Act or Internal Revenue Code) on:
December 15, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

During the fiscal year ended Sept. 30, 1944, a sale was made of an unsubdivided portion of taxpayer's property to one Snow for \$90,000.00, having a cost basis of \$23,636.93, leaving a profit of \$66,363.07. During the fiscal year taxpayer collected \$27,000.00, principal or 30% of the sale price and elected to report said sale on the Installment Basis—I.R.C. Sec. 44(b).

Taxpayer erroneously reported returnable income of \$19,908.22, from said sale as normal tax net income as item 14 in its Corporation Income and Declared Value Excess Profits Tax Return for its fiscal year ended Sept. 30, 1944.

Taxpayer failed to report returnable income of \$19,908.22, from said sale on Schedule C (Form 1120) Schedule of Capital Gains and Losses as net gain from sale or exchange of capital assets as item 12(a) Form 1120. I.R.C. 117 (a) (10) (A); and taxpayer further failed to calculate alternative taxes on Schedule C (Form 1120) I.R.C. 117 (c) (1).

[Seal]

PALOS VERDES
CORPORATION,

/s/ K. C. VANDERLIP.

Subscribed and sworn to before me this 27th day of Oct., 1946.

[Seal]

GENEVA SCHWARTZ.

The above claim for refund was prepared by the undersigned upon facts furnished by the taxpayer, which facts I believe to be true and correct.

JOHN T. RILEY. [7]

Tax Calculation

Total Normal Tax and Surtax (Line 27, Page 2, Form 1120).....	\$17,066.36
Alternative Tax and Surtax (Line 29, Schedule C, Form 1120).....	11,598.48
Line 28, Page 2, Form 1120 should have been	11,598.48
Lines 41 and 45, Page 1, Form 1120 should have been.....	11,598.48
Overassessment	5,467.88

State of California,
County of Los Angeles—ss.

Kelvin C. Vanderlip, being by me first duly sworn, deposes and says: that he is the President of Palos Verdes Corporation, the Plaintiff in the above-entitled action; that he has read the foregoing Complaint for Refund of Income Tax and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it is true.

/s/ KELVIN C. VANDERLIP.

Subscribed and sworn to before me this 6th day of April, 1950.

[Seal] /s/ G. M. STRETCH,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 16, 1951.

[Endorsed]: Filed April 11, 1950. [9]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and, in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Denies the allegations contained in paragraph IV thereof except as in this paragraph expressly admitted or alleged.

It is admitted that in the month of July, 1944, plaintiff sold to one Snow an unsubdivided portion

of its real property in the County of Los Angeles, State of California, for the sum of \$90,000; that said property had a cost basis to [10] plaintiff of \$23,636.93, and that the gain realized on the sale was \$66,363.07.

It is also admitted that during the fiscal year ended September 30, 1944, plaintiff received from Snow on account of the purchase price the sum of \$27,000, and elected, pursuant to Section 44 of the Internal Revenue Code, to report the gain from said sale on the installment basis for income tax purposes; that in accordance with such election, plaintiff reported as ordinary income in its income and declared value excess profits tax return for the fiscal year ended September 30, 1944, the sum of \$19,098.22, being the portion of the gain allocable to said fiscal year.

It is further admitted that plaintiff's income and declared value excess profits tax return for the fiscal year ended September 30, 1944, was filed at the time and place alleged and that the reported tax of \$17,066.36; was paid to Collector Westover.

V.

In answer to paragraph V thereof, defendant admits that plaintiff filed claims for refund on or about May 9, 1945, and on or about October 27, 1946. Defendant denies, however, that the sum alleged was erroneously paid and/or illegally collected.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the and as to those matters that he believes it is true.

Schedule C, Form 1130)..... 11,598.48

allegations contained in Exhibits A and B attached to plaintiff's complaint, except insofar as such allegations are consistent with the expressed admissions contained in this answer.

VI.

Admits the allegations contained in paragraph VI thereof.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,
United States Attorney,

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States
Attorney.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue.

/s/ E. H. MITCHELL,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 16, 1950. [11]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel, that the following facts may be taken as true, subject to objection insofar as immateriality, irrelevancy, and incompetency. The execution and filing of the stipulation shall not preclude either party from offering and including such additional evidence as is not inconsistent therewith.

1. This is an action for refund of income tax arising under the provisions of the Internal Revenue Code of the United States. Harry C. Westover, the Collector of Internal Revenue, Sixth District of California, to whom the income tax herein involved was paid in his official capacity as such Collector was not in office at the time of filing of this action, to wit, April 11, 1950.

2. On December 15, 1944, plaintiff filed with the Collector of Internal Revenue, Sixth District of California, its Corporation Income [13] and Declared Value Excess Profits Tax Return for the period commencing October 1, 1943, and ending September 30, 1944, and paid to said Collector the sum of \$17,066.36, a copy of which return is attached hereto and made a part hereof as Exhibit 1.

Plaintiff filed its claim for refund in the amount of \$5,467.88, with Harry C. Westover, said Collector, on March 9, 1945, a copy of which is attached hereto, made a part hereof as Exhibit 2.

Plaintiff filed again its claim for refund with said Collector on October 30, 1946, in said amount, a copy of which is attached hereto and made a part hereof as Exhibit 3. By letter to plaintiff dated August 4, 1949, the Commissioner of Internal Revenue of the United States disallowed said claim for refund, a copy of said letter is attached hereto and made a part hereof as Exhibit 4.

3. Plaintiff is a corporation organized November 27, 1925, under the laws of the state of Delaware with its principal office and place of business located in the City of Wilmington, County of Newcastle, Delaware. Since 1926, plaintiff has transacted and is doing business in the County of Los Angeles, State of California. Plaintiff took over from Palos Verdes Syndicate as of January 1, 1926, approximately 12,245 acres of land in the County of Los Angeles, State of California, with other assets, giving in exchange therefor 54,000 shares of its common stock having an aggregate par value of \$5,400,000, issued pro rata to the members of the Syndicate as their interests appeared. Said land was known as "Rancho Palos Verdes."

4. In the month of July, 1944, plaintiff sold to one Snow an unsubdivided portion of plaintiff's real property in the County of Los Angeles, State of California, for the sum of \$90,000.00. Said real property has a cost basis to plaintiff of the sum of \$23,636.93, resulting in a profit or gain of \$66,363.07. During the fiscal year of plaintiff commencing October 1, 1943, and ending September 30,

1944, plaintiff received from said Snow on account of said purchase price of \$90,000.00, the sum of \$27,000.00, and elected pursuant to Section 44 (B) of the Internal Revenue [14] Code to report for income tax purposes said sale upon the installment basis. Said real property sold to Snow was acquired by the plaintiff as part of said 12,245 acres of land transferred to plaintiff as of January 1, 1926, in exchange for its common stock. Said real property has been owned and held by plaintiff since said date to wit, January 1, 1926.

5. Attached hereto and made a part hereof as Exhibit 5 is the yearly income derived by plaintiff from farm and pasture rentals, rock and earth royalties and crop sales of Rancho Palos Verdes from 1932 to and including September 30, 1944.

6. Attached hereto and made a part hereof as Exhibit 6 is the yearly income of plaintiff derived from leasing for agricultural purposes of real property included in the parcel sold to Snow in July, 1944, for the fiscal year ending September 30, for the years 1939-1944, inclusive.

7. Attached hereto and made a part hereof as Exhibit 7 are the yearly sales by plaintiff, the number of acres and selling price of the unsubdivided portions and of the subdivided portions of Rancho Palos Verdes for the fiscal years ending September 30, 1939, through September 30, 1944.

8. Attached hereto and made a part hereof as Exhibit 8 is a true and correct copy of the body

of the Deed of Conveyance from plaintiff to Snow dated July . . , 1944.

9. Attached hereto and made a part hereof as Exhibit 9 are the real property taxes of plaintiff for the years 1935-36, to and including 1942-43.

Dated this 1st day of May, 1951.

RILEY and HALL,

By /s/ WILLIAM D. BEHNKE,
Attorney for Plaintiff.

ERNEST A. TOLIN,
United States Attorney,

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants U. S. Attorney.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ FRANK W. MAHONEY,
Attorneys for Defendant. [15]

EXHIBIT 1

United States of America
Treasury Department
Washington

July 20, 1950

To All to Whom These Presents Shall Come,
Greeting:

I certify that the annexed are true copies of Corporation Income and Declared Value Excess-Profits Tax and Corporation Excess Profits Tax Returns for fiscal year ending September 30, 1944 (with schedules attached to former return) filed by Palos Verdes Corporation, Rolling Hills via Lomita, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal] /s/ A. L. DUNCAN,
Assistant Head, Records Division Income Tax Unit,
Bureau of Internal Revenue.

FOLD

22

UNITED STATES

CORPORATION INCOME AND DECLARED VALUE EXCESS-PROFITS TAX RETURN

For Calendar Year 1942

Less: Income subject to excess profits tax. (From Form 1121)
 Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 37 minus item 38, above)
 Normal tax net income

TOTAL INCOME AND DECLARED VALUE EXCESS-PROFITS TAXES

Total income tax (line 28 or 50, page 2, whichever is applicable)
 Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation
 Balance of income tax

45. Total declared value excess-profits tax (line 8, page 2) 17,066.36

46. Total income and declared value excess-profits taxes due 17,066.36

47. We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 14th day of December, 1942.

John C. Connelley (Signature of officer administering oath)
 Notary Public (Seal)
 My Comm. Exp. 1943

AFFIDAVIT. (See Instructions to Form 1121)
 I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

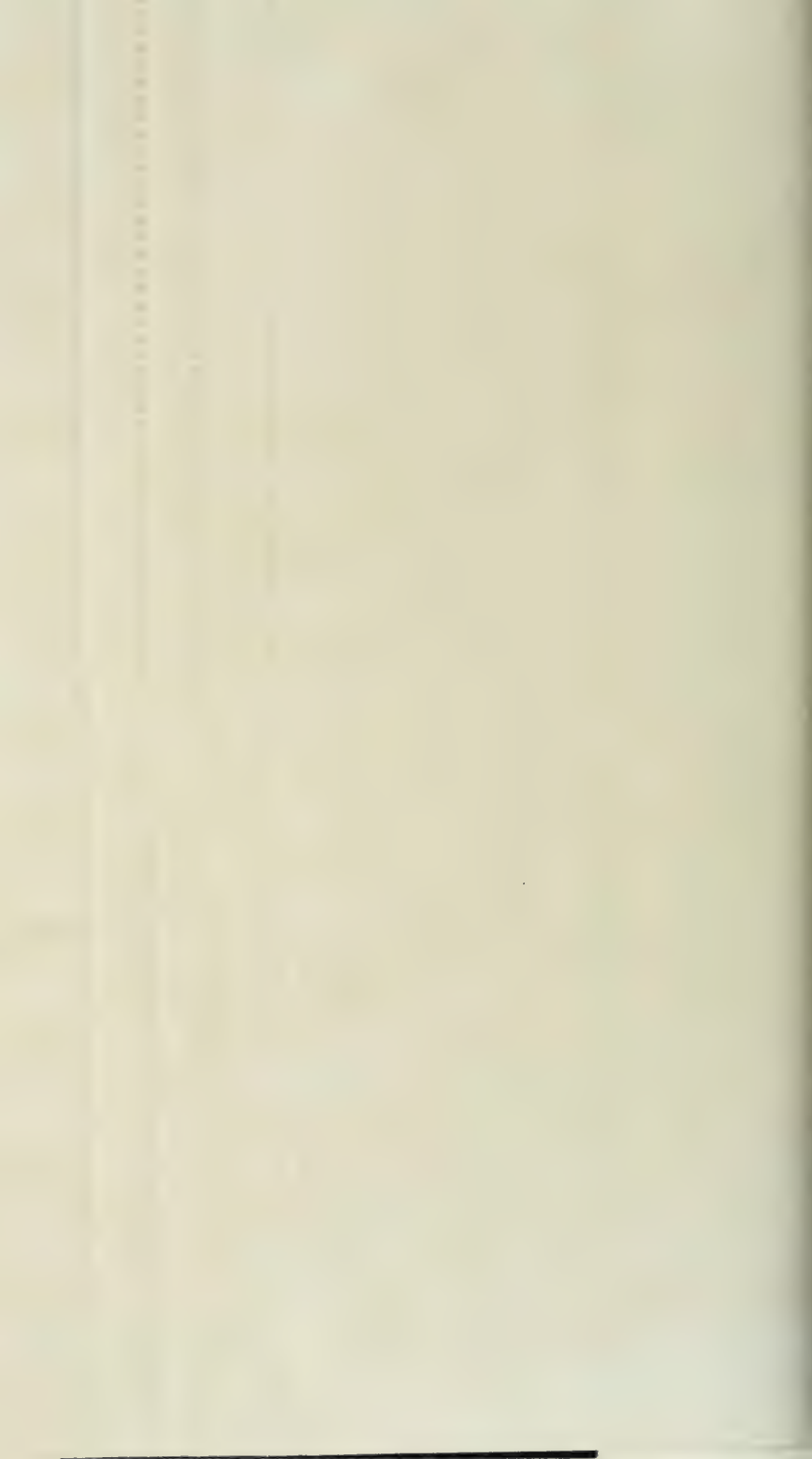
Subscribed and sworn to before me this 15th day of December, 1942.

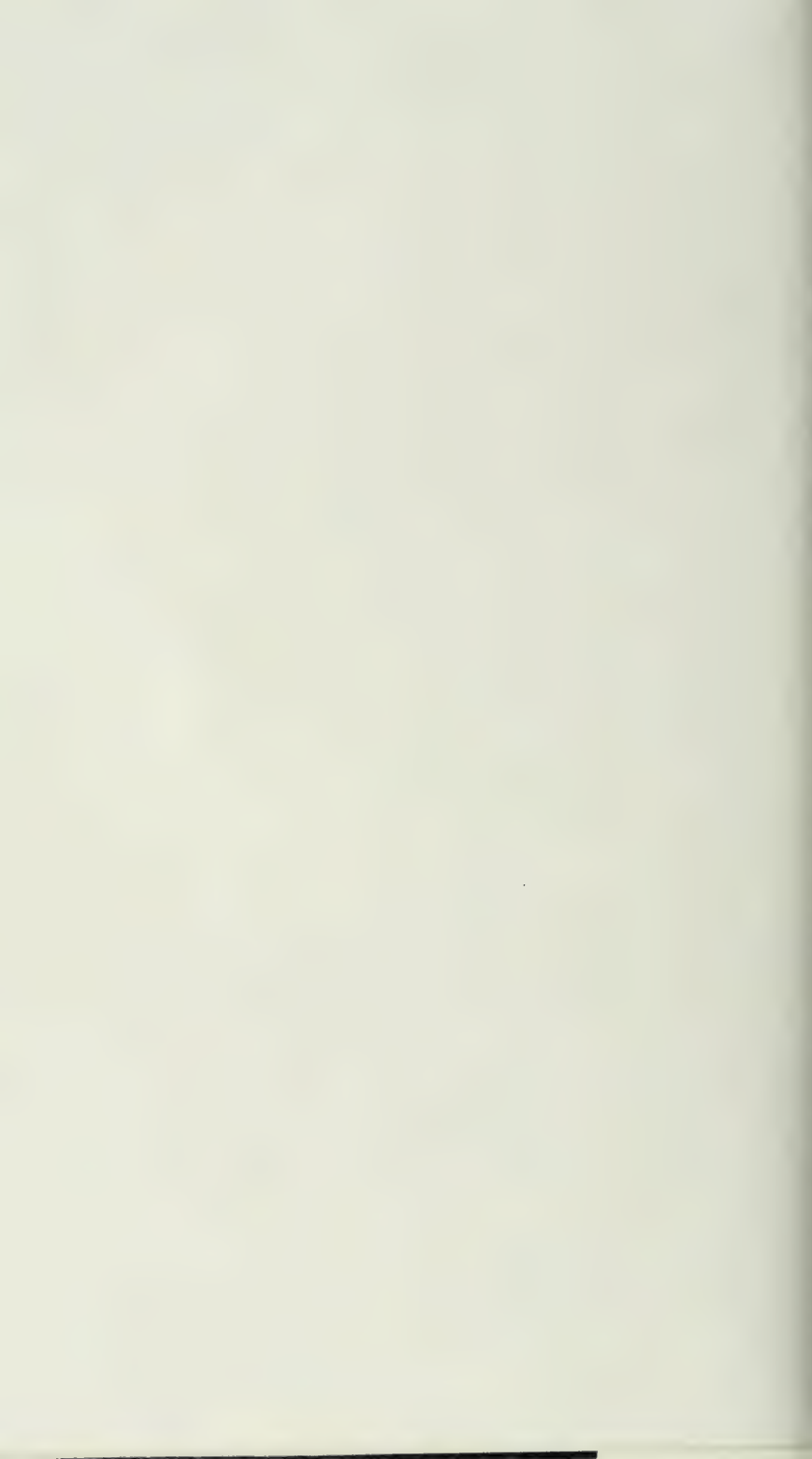
John C. Connelley (Signature of officer administering oath)
 Notary Public (Seal)
 My Comm. Exp. 1943

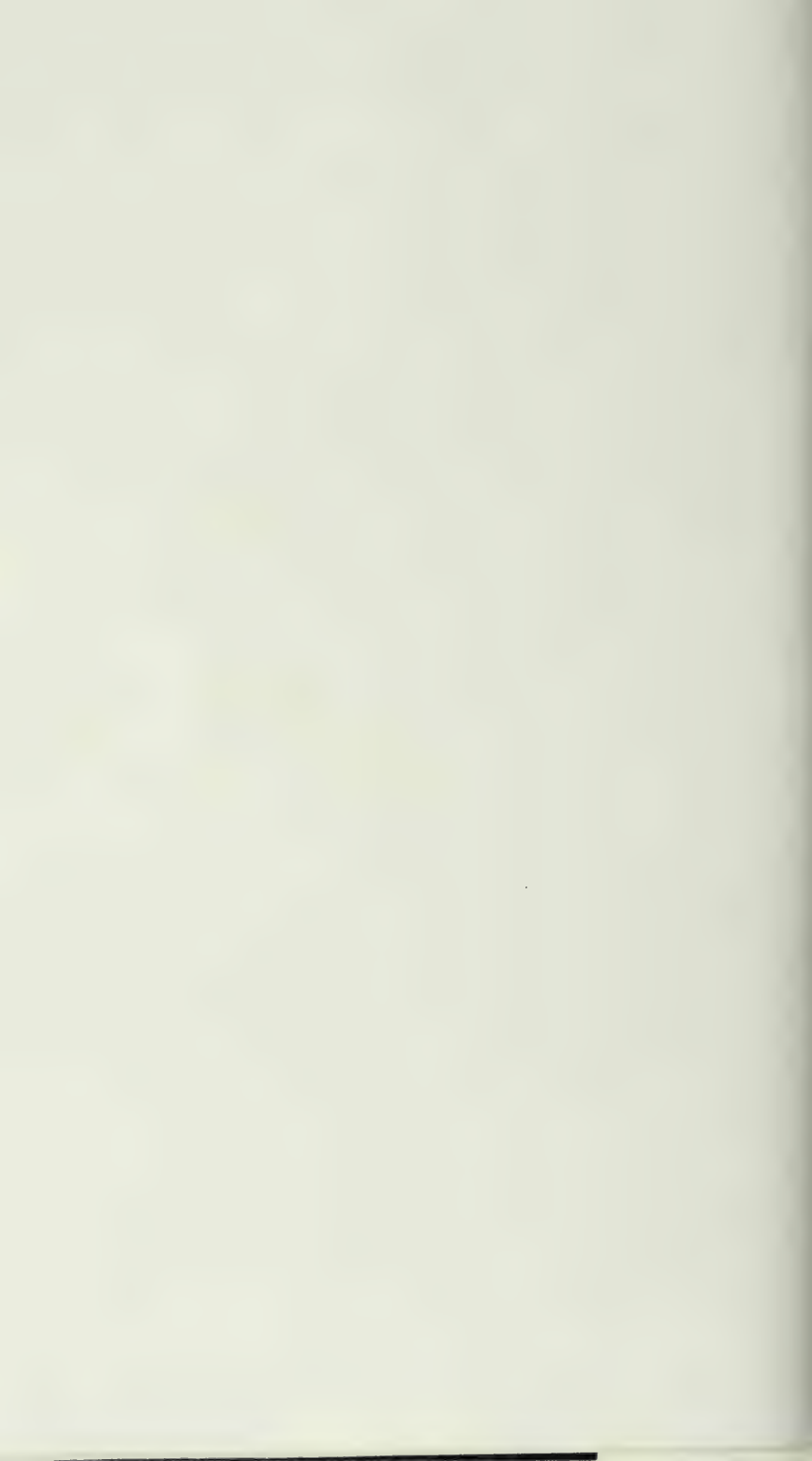
AFFIDAVIT. (See Instructions to Form 1121)
 I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

John C. Connelley (Signature of officer administering oath)
 Notary Public (Seal)
 My Comm. Exp. 1943

John C. Connelley (Signature of officer administering oath)
 Notary Public (Seal)
 My Comm. Exp. 1943









Palos Verdes Corporation

Income Tax Return

October 1, 1943, to September 30, 1944

Item 14—

Ranch produce	\$ 38,575.52
Sales of land.....	\$305,593.67
Less cost of land sold.....	\$245,986.63
appreciation	132,742.85 113,243.78
	<hr/>
	\$192,349.89
Deduct unrealized profit on installment sale	46,454.15
	<hr/>
Profit subject to income tax.....	145,895.74
Sale of right of way to U.S. Navy.....	200.00
Profit on cancellation of real estate sale.....	700.00
Profit on sale of equipment.....	337.75
Discount earned	1.30
Miscellaneous income	55.23
	<hr/>
Page 1, item 14.....	<u>\$185,765.54</u>

Item 29—

Sales expense	\$ 18,369.31
Office expense	2,257.40
New York office expense.....	3,289.59
Telephone and telegraph.....	2,075.15
Dues and subscriptions.....	643.28
Legal and auditing.....	8,045.91
Engineering expense	14,255.81
Condemnation expense	5,407.89
Insurance	1,829.22
Water	9,137.33
Gasoline and oil.....	482.11
Autos, trucks and tractors.....	1,429.98
Ranch expense	7,196.63
General expense	9,799.99
Work done on proposed subdivisions abandoned	10,658.45
Golf club—Palos Verdes—memberships abandoned	3,400.00
Miscellaneous expense	398.06

Page 1, item 29.....\$ 98,676.11

Item 24—

This item represents cost of engineering and rough grade on proposed subdivision substantially all of which was washed out by rains. Entire plan now abandoned.....\$ 13,476.04

Palos Verdes Corporation

Depletion Schedule

October 1, 1943, to September 30, 1944

	Book Value	Cost Basis	Appreciat'n
Acreage 195.13	\$91,806.70	\$37,143.92	\$55,662.78
Estimated recovery 800,000 tons—unit value .....	.1147584c	.0451790c	.0695785c
Production during year 466,428.6 tons	\$53,526.60	\$21,073.20	\$32,453.40
		(Item 26)	

The property herein involved was leased by the operators for purposes of extracting granite for use on federal projects in or near San Pedro, Calif. The land leased contained approximately the tonnage required and owing to the condition after quarrying operations are complete the property will have little or no value.

Answer to Question 9(a)

1. Rancho Mutual Water Company, Rolling Hills, Calif.
2. 99.5%.
3. April 1936.
4. This company is a mutual water company organized in connection with taxpayers real estate development. It serves only land owners within the development who hold shares in conjunction with their land ownership. Ultimately all stock will be transferred when sales are completed. The subject company has been granted exemption from filing income tax returns. [22]

Palos Verdes Corporation

Schedule M

Reconciliation of Net Income and Analysis of
Earned Surplus and Capital Deficit

	Together	Earned Surplus	Capital Deficit
Balance at October 1, 1943....	\$(305,308.38)	\$122,625.45	\$(427,933.83)
Income per tax return.....	44,464.83	44,464.83	
Assessments and accrued interest for local improvements credited to Surplus account property abandonment, sold to State for delinquent property tax and having no actual or book value	1,447.78	1,447.78	
Appreciation realized			
Sales	(132,742.85)		(132,742.85)
Depletion on quarry.....	(32,453.40)		(32,453.40)
	<u>\$(424,592.02)</u>	<u>\$168,538.06</u>	<u>\$(593,130.08)</u>

	Beginning of Year	End of Year
Balance sheet items—Schedule L, Line 13		
Deposits	\$6,000.00	\$ 4,035.00
Prepaid rents	87.08	1,612.00
Unrealized profits on installment sale.....	.....	46,454.15
	<u>\$6,087.08</u>	<u>\$52,101.15</u>

UNITED STATES CORPORATION EXCESS PROFITS TAX RETURN For Calendar Year 1943

for fiscal year beginning Oct. 1, 1943, and ending Sept. 30, 1944

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

PALOM VERDES CORPORATION

Rural Route 1, Box 33

(Street and number)

Hollister Hills via Lomita,

California

(City or Town)

Business serial number entered on page 1, Form 1120

EXCESS PROFITS TAX COMPUTATION

File No. 56
Serial No. 94000
Date Recd. 6-20-44
DEC 18 1944
Cred. Chas. H. H. H.
LON - This payment

See instructions to:

1. Excess profits net income (line 16, Schedule A) Schedule attached
2. Specific exemption 3/12 of \$5,000.00 and 9/12 of \$10,000.00
3. Excess profits credit—based on income (line 46, Schedule B)
4. Excess profits credit—based on invested capital (line 41, Schedule C)
5. Unused excess profits credit adjustment (attach schedule)
6. Total of items 2 to 5
7. Difference between item 1 and item 6
8. Adjusted excess profits net income (item 7, column 1, or item 7, column 2, whichever is applicable)
9. 80 percent of item 8
10. Net income (computed without regard to the credit provided by section 26 (c)) (item 35, page 1, Form 1120)
11. Less: (a) Dividends received credit (85 percent of total of column 2, Schedule E, Form 1120 (excluding dividends received on certain preferred stock of a public utility), but not in excess of 85 percent of item 10 above)
(b) Dividends paid on certain preferred stocks if taxpayer is a public utility (line 20, page 2, Form 1120)
12. Surplus net income (computed without regard to the credit provided by section 26 (a))
13. 80 percent of item 12
14. Income tax under Chapter 1 (other than section 102) for the taxable year (item 41, page 1, Form 1120)
15. Excess of item 13 over item 14
16. Item 9, or item 15, whichever is lower
17. Amount deferred by reason of the application of section 710 (a) (5) (relating to abnormality under section 722) (attach schedule)
18. Excess profits tax:
(a) Item 16 minus item 17
(b) If schedule is filed under question (a), page 2, amount of tax as computed in such schedule
(c) Item 18 (a) or item 18 (b), whichever is applicable
Less: Credit for income taxes paid to a foreign country or United States possession allowed to a domestic corporation (portion not used in computing item 42, page 1, Form 1120)
19. Item 18 (c) minus item 19
20. Less: Credit for debt retirement (item 28, below)
21. Item 20 minus item 21
22. Amount, if any, due to application of section 784 (adjustment in case of position inconsistent with prior income tax liability) (attach schedule)
23. Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)

POST-WAR REFUND OF EXCESS PROFITS TAX AND CREDIT FOR DEBT RETIREMENT

24. Balance of excess profits tax (item 18 (c), above)
25. Credit allowable under sections 780 and 781 (10 percent of item 25) (but in cases where item 25 is applicable, see Specific Instructions 25-49)
26. Lesser of amounts paid on indebtedness or net reduction in indebtedness under section 783 (b) (2)
27. Credit for debt retirement allowable under section 783 (40 percent of item 27, but not in excess of 10 percent of item 25)
28. Net post-war refund credit (item 26 minus item 28)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that this return (including any accompanying schedules and statements) has been prepared by him or her and that he or she knows the contents thereof and believes the same to be true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Act of 1939, as amended.

Subscribed and sworn to before me this 14th day of December, 1944

NOTARIAL SEAL

Notary Public

CORPORATE SEAL

I, the undersigned, certify that I have prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true and correct statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared of which I am aware.

Subscribed and sworn to before me this 15th day of December, 1944

NOTARIAL SEAL

Signature of officer administering oath

(Title)

1944

727 TITLE INSURANCE CO.
423 SOUTH SPRING ST.
LOS ANGELES, CALIF.

QUESTIONS

- (a) Date of incorporation April 27, 1926
- (b) State or country Delaware
- (c) Collector's office in which your income tax return for the taxable year was filed 6th Dist. of California
- (d) Is this a consolidated return? No If so, prepare from the collector Form 851, Affiliations Schedule, which shall be filed in, under and as a part of the consolidated income tax return.
- (e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received by the amount of amortizable bond premium under section 125 attributable to all Government obligations described in section 22(b)(4) of the Revenue Code? (Answer "yes" or "no") None
- (f) Are you a transferor or transferee upon an exchange as defined by section 766 or 761 of the Internal Revenue Code? (Answer "yes" or "no") No If answer is "yes":
- (1) Check the appropriate sections and submit schedules showing computation: 710(a) ☐; 721 ☐; 726 ☐; 781 ☐; 733(b) ☐; 735(c) ☐
- (2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following: 721, \$; 726, \$; 731, \$
- (3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following: 721, \$; 731, \$; 735(b), \$; 735(c), \$
- (g) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column). \$ 5,065,006.27

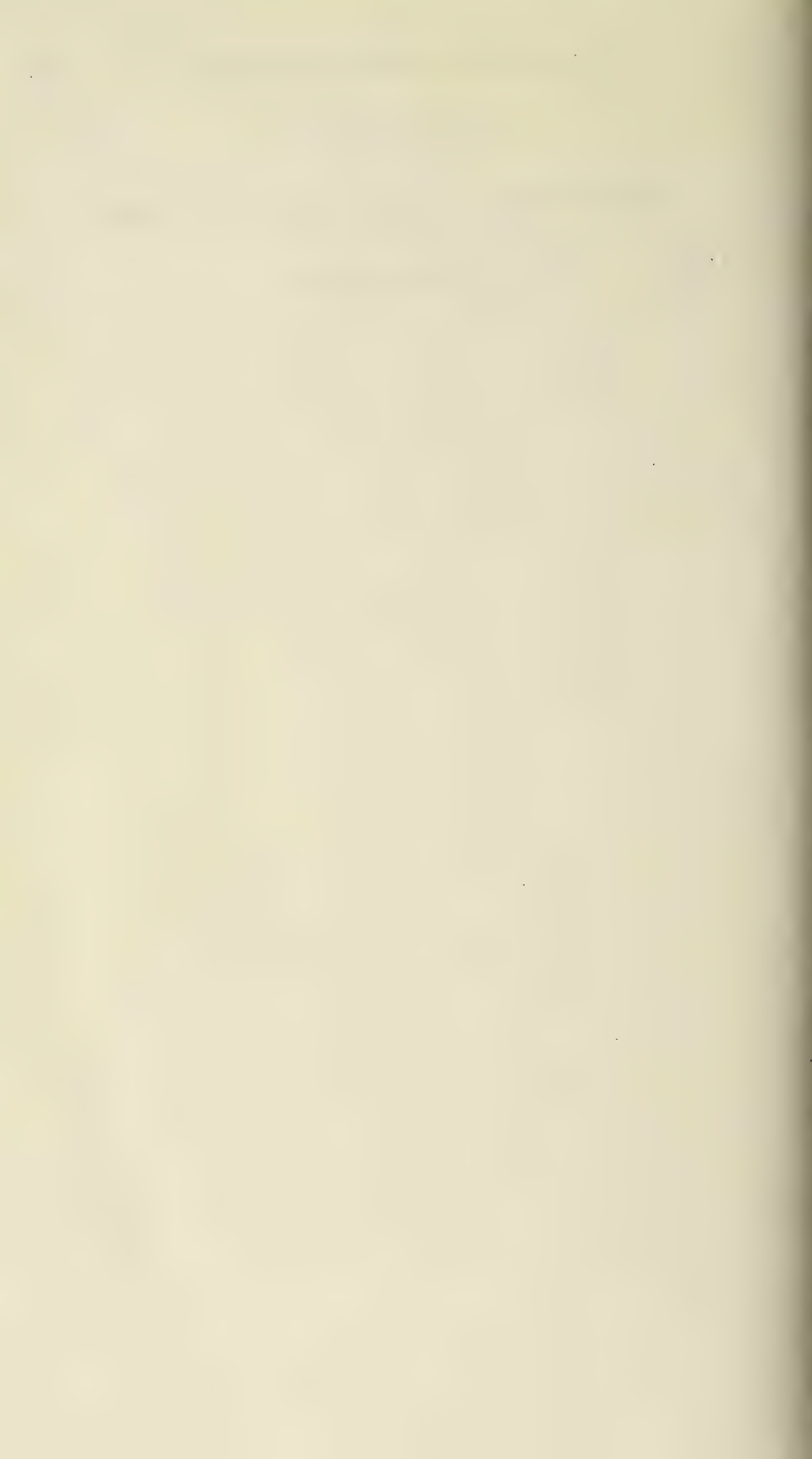
Schedule A.—EXCESS PROFITS NET INCOME COMPUTATION

Line No.	COLUMN 1 INCOME CREDIT METHOD	COLUMN 2 INVESTED CAPITAL METHOD
1. Normal tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 37, page 1, Form 1120)		\$ <u>144,161</u>
2. Net short-term capital gain (do not enter net short-term capital loss)		
3. Adjustment to net operating loss deduction		
4. Decrease in deductions limited by income		
5. 50 percent of interest on borrowed capital		
6. Interest on Government obligations (see question (e) above, for election)	*****	
7. Total of lines 1 to 6	*****	
8. Net gain from sale or exchange of capital assets (item 13 (a), page 1, Form 1120)	\$ <u> </u>	\$ <u>144,161</u>
9. Income from retirement or discharge of bonds, etc.	\$ <u> </u>	\$ <u> </u>
10. Refunds and interest on Agricultural Adjustment Act loans		
11. Recoveries of bad debts		
12. Increase in deductions limited by income		
13. (a) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)		
(b) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)		
14. Nontaxable income of certain industries with depletable resources	*****	
15. Total of lines 8 to 14	\$ <u> </u>	\$ <u>144,161</u>
16. Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15)	\$ <u> </u>	\$ <u>144,161</u>
17. Deductions applicable to life insurance companies	\$ <u> </u>	\$ <u>144,161</u>
18. Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	\$ <u> </u>	\$ <u> </u>

Schedule B

Excess Profits Credit—Based on Income

[Items 1 to 46—No data shown.]



Schedule C—EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL

Equity Invested Capital at the Beginning of the Taxable Year (See Instructions for Schedule C, Lines 1 to 12, inclusive)		
1. Money paid in for stock, or as paid-in surplus, or as a contribution to capital.		
2. Property paid in for stock, or as paid-in surplus, or as a contribution to capital.		
3. Distributions of earnings and profits in stock of the corporation.		\$1,680,451
4. (a) Accumulated earnings and profits.		
(b) Adjustment for transferor's deficit under section 718 (c) (3).	\$122,625.45	
(c) Increase or decrease under section 761 (d) (1) on account of intercorporate liquidation.		
(d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c).		122,625.45
5. 25 percent of new capital paid in during a taxable year beginning after December 31, 1949.		
6. Increase on account of intercorporate liquidation under section 761 (d) (2).		
7. Deficit in earnings and profits of another corporation under section 718 (a) (7).		
8. Total of lines 1 to 7.		\$1,803,080.02
9. Less: Distributions made prior to the taxable year.	Unallocated earnings and profits	
10. Earnings and profits of another corporation deducted by section 718 (b) (3).		
11. Decrease on account of intercorporate liquidation under section 761 (d) (2).		
12. Deficit in earnings and profits of another corporation (section 718 (b) (5)).		
13. Total of lines 9 to 12.		-0-
14. Equity invested capital at beginning of taxable year.	(line 8 minus line 13)	\$1,803,080.02
Average Reduction in Equity Invested Capital During the Taxable Year (See Instructions for Schedule C, Lines 1 to 12, inclusive)		
15. Money paid in for stock, or as paid-in surplus, or as a contribution to capital.		
16. Property paid in for stock, or as paid-in surplus, or as a contribution to capital.		
17. Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation.		
18. 25 percent of new capital paid in during a taxable year beginning after December 31, 1949.		
19. Increase on account of intercorporate liquidation under section 761 (d) (2).		
20. Deficit in earnings and profits of another corporation under section 718 (a) (7).		
21. Total of lines 15 to 20.		
22. Total of lines 15 to 20.		\$1,803,080.02
Average Reduction in Equity Invested Capital During the Taxable Year (See Instructions for Schedule C, Lines 15 to 21, inclusive)		
23. Distribution of earnings and profits of the taxable year.		
24. Decrease on account of intercorporate liquidation under section 761 (d) (2).		
25. Deficit in earnings and profits included in invested capital of another corporation (section 718 (b) (5)).		
26. Total reductions in lines 23 to 25.		
27. Average equity invested capital (line 22 minus line 26).		\$1,803,080.02
28. Average borrowed capital (attach schedule).		\$1,803,080.02
29. Average borrowed invested capital (50 percent of line 28).		
30. Total inadmissible assets.		\$1,803,080.02
31. Total admissible and inadmissible assets.		
32. Percentage which line 29 is of line 31.		
33. Reduction on account of inadmissible assets (percent of line 31).		
34. Invested capital (line 31 minus line 33).		\$1,803,080.02
35. Portion of line 34 (not in excess of \$5,000,000) and credit at 8 percent.	\$1,803,080.02	8%
36. Portion of line 34 (over \$5,000,000, but not over \$10,000,000) and credit at 7 percent.		7%
37. Portion of line 34 (over \$10,000,000, but not over \$200,000,000) and credit at 6 percent.		6%
38. Portion of line 34 (over \$200,000,000) and credit at 5 percent.		5%
39. Excess profits credit—based on invested capital (total of lines 35 to 38).		\$144,246.40

EXHIBIT 2

United States of America
Treasury Department
Washington

July 20, 1950

To All to Whom These Presents Shall Come,
Greeting:

I certify that the annexed is a true copy of Claim for Refund of \$5,467.88, Income and Excess Profits Tax for fiscal year ending September 30, 1944 (with additional sheet attached) filed by Palos Verdes Corporation Rolling Hills via Lomita, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal] /s/ A. L. DUNCAN,
Assistant Head, Records Division Income Tax Unit,
Bureau of Internal Revenue.

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ REFUND OF TAX ILLEGALLY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNPAID, OR USED IN EXCESS OF RATES.

☐ STATEMENT OF TAX AMOUNT (not applicable to certain income taxes).

CLAIMS SECTION
JUN 27 1945

COLLECTOR'S STAMP

(Date received)

RECEIVED

MAY 9 1945

FED. INT. REV.
LOS ANGELES, CAL.
1945

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Feb. 140160-1945 List
NC-9400062-1945 List

Name of taxpayer or purchaser of stamps Falos Verdes Corporation

Business address R. R. #1, Box #33, Rolling Hills via Lomita, California.

Residence

TYPE
OR
PRINT

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer and that the facts given below are true and complete:

1. District in which return (if any) was filed 6th Dist. of California

2. Period (if for income tax, make separate form for each taxable year) from Oct. 1 1943 to Sept. 30 1944

3. Character of assessment or tax income and excess profits tax

4. Amount of assessment, \$ 17,066.36; date of payment

5. Date stamps were purchased from the Government

6. Amount to be refunded

\$ 5,167.88

7. Amount to be abated (not applicable to income or estate taxes)

8. The time within which this claim may be legally filed expires, under Section 1120 of the Revenue Act of 1938 on December 15, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

During the fiscal year ended Sept. 30, 1944, a sale was made of an unsubdivided portion of taxpayers' property to one Snow for \$90,000.00, having a cost basis of \$23,636.93, leaving a profit of \$66,363.07. During the fiscal year taxpayer collected \$27,000.00, principal or 30% of the sale price and elected to report said sale on the Installment Basis - I.R.C. Sec. 144(b).

Taxpayer erroneously reported returnable income of \$19,908.22 from said sale as normal tax net income as item 14 in its Corporation Income and Declared Value Excess Profits Tax Return for its fiscal year ended Sept. 30, 1944.

Taxpayer failed to report returnable income of \$19,908.22 from said sale on Schedule C (Form 1120) Schedule of Capital Gains and Losses as net gain from sale or exchange of capital assets as item 12(a) form 1120. I.R.C. 117 (a) (10) (A); and taxpayer further failed to calculate Alternative Taxes on Schedule C (form 1120) I.R.C. 117(c)(1) 0.2 full rate

(Amount in brackets should be in full and in dollars)

Return to and collected before me this

Signed FALOS VERDES CORPORATION

7th day of May 1945

by

W. L. W. W. W. W. W.
Pres.

Edwin H. Carmick
(Signature of officer administering oath)

Victory Public
(Title)

(SEE INSTRUCTIONS ON REVERSE SIDE)

The above claim for refund was prepared by the undersigned upon facts furnished by the taxpayer, which facts I believe to be true and correct.

37

OXLEY

OXLEY

I certify that the records of this office show the following facts as to the purchase of stamps:

[illegible]

6th Calif.
(District)

2

Amount rejected \$

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
4. Where the taxpayer is a corporation, the claim shall be signed, with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Tax Calculation

Total normal tax and surtax (line 27, page 2, Form 1120)	\$17,066.36
Alternative tax and surtax (line 29, Schedule C, Form 1120)	11,598.48
Line 28, page 2, Form 1120 should have been	11,598.48
Lines 41 and 45, page 1, Form 1120 should have been	11,598.48
Overassessment	5,467.88

EXHIBIT 3

United States of America
Treasury Department
Washington

July 20, 1950

To All to Whom These Presents Shall Come,
Greeting:

I certify that the annexed is a true copy of Claim for Refund (second filing) of \$5,467.88, Income and Excess Profits Tax for fiscal year ending September 30, 1944 (with additional sheet attached) filed by Palos Verdes Corporation, Rolling Hills via Lomita, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Depart-

ment to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal] /s/ A. L. DUNCAN,
Assistant Head, Records Division Income Tax Unit,
Bureau of Internal Revenue.

SECOND FILING OF CLAIM - ORIGINAL FILED MAY 9, 1945
CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the type of claim filed, and fill in the certificate on the reverse side.

- ☐ REFUND ON TAX REGULARLY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNPAID, OR PAID IN EXCESS OR IN ADVANCE.
- ☐ ABATEMENT OF TAX ASSESSMENT (not applicable to estate, gift, or income taxes).

JUN 2 1947

COLLECTOR'S STAMP
(Date received)

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Feb. 410160-'45 L.
NC-9400062-'45 L.

Name of taxpayer or purchaser of stamps PALOS VERDES CORPORATION

Business address R. R. #1, Box #33, Rolling Hills via Lomita, California.

Residence

TYPE
OR
PRINT

The depositor, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named and that the facts given below are true and complete:

- 1. District in which return (if any) was filed 6th Dist. of California
- 2. Period (if for income tax, make separate form for each taxable year) from Oct. 1 1943 to Sept. 30 1944
- 3. Character of assessment or tax Income and excess profits tax
- 4. Amount of assessment, \$17,066.36; dates of payment 12-15-44, 3-15-45, 6-15-45 and 9-15-45
- 5. Date stamps were purchased from the Government
- 6. Amount to be refunded
- 7. Amount to be abated (not applicable to income, gift, or state taxes) \$ 5,167.88
- 8. The time within which this claim may be legally filed expires, under Section December 15, 1947 of the Revenue Act of 1944

The depositor verily believes that this claim should be allowed for the following reasons:

During the fiscal year ended Sept. 30, 1944, a sale was made of an unsubdivided portion of taxpayer's property to one Snow for \$90,000.00, having a cost basis of \$23,636.93, leaving a profit of \$66,363.07. During the fiscal year taxpayer collected \$27,000.00, principal or 30% of the sale price and elected to report said sale on the Installment Basis - I.R.C. Sec. 44(b).

Taxpayer erroneously reported returnable income of \$19,908.22 from said sale as normal tax net income as item 14 in its Corporation Income and Declared Value Excess Profits Tax Return for its fiscal year ended Sept. 30, 1944.

Taxpayer failed to report returnable income of \$19,908.22 from said sale on Schedule C (Form 1120) Schedule of Capital Gains and Losses as net gain from sale or exchange of capital assets as item 12(a) form 1120. I.R.C. 117(a) (10) (A); and taxpayer further failed to calculate Alternative Taxes on Schedule C (form 1120) I.R.C. 117(e)(1)

(Attach letter explaining grounds if space is not sufficient)

Sworn to and subscribed before me this

Signed PALOS VERDES CORPORATION

18 day of October 1946
Pauline Bush
(Signature of officer administering oath)

By X Edwin C. Dunderberg Pres.

The above claim for Refund was prepared by the undersigned upon facts furnished by the taxpayer, which facts I believe to be true and correct.

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I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column.)

Claim of tax and taxable year or period	ASSESSMENT LIST			ACCOUNT NO. OR		Amount assessed	PAID, ABATED, OR CREDITED			
	List	Month	Year	Page	Line		Date	Amount		
10/1/43 - 9/30/44	IT	Feb.	1945	410160		\$ 17.066	%	12/15/44	\$ 4.266	%
								3/15/45	\$ 4.266	%
								6/5/45	\$ 4.266	%
								9/10/45	\$ 4.266	%
Refund claim \$5,467.88 Filed 5/9/45										
10/1/43 - 9/30/44	IT		1945	NC-94,00062		None			None	
Total,						\$ 17.066	%	Total,	\$ 17.066	%

I certify that the records of this office show the following facts as to the purchase of stamps:

[illegible]

Harry C. Weston
Collector of Internal Revenue.

6th Calif
(District)

COMMITTEE ON CLAIMS

Claim examined by—

Claim approved by—

Chief of Division.

Amount claimed \$

Amount allowed \$

Amount rejected \$

INSTRUCTIONS

- ### INSTRUCTIONS
1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
 2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
 3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the decedent, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim if the amount refundable is not in excess of \$100.00, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
 4. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of an officer having authority to sign for the corporation.

Tax Calculation

Total normal tax and surtax (line 27, page 2, Form 1120).....	\$17,066.36
Alternative tax and surtax (line 29, Schedule C, Form 1120).....	11,598.48
Line 28, page 2, Form 1120 should have been	11,598.48
Lines 41 and 45, page 1, Form 1120 should have been.....	11,598.48
Overassessment	5,467.88

EXHIBIT 4

United States of America
Treasury Department
Washington

July 20, 1950

To All to Whom These Presents Shall Come,
Greeting:

I certify that the annexed is a true copy of copy
of letter dated August 4, 1949 to Palos Verdes Cor-
poration, Rolling Hills via Lomita, California from
E. I. McLarney, Commissioner, on file in this De-
partment.

In Witness Whereof, I have hereunto set my
hand, and caused the seal of the Treasury Depart-
ment to be affixed, on the day and year first above
written.

By direction of the Secretary of the Treasury:

[Seal] /s/ A. L. DUNCAN,
Assistant Head, Records Division Income Tax Unit,
Bureau of Internal Revenue.

Aug. 4, 1949.

IT:Cl:CC:Rej

Palos Verdes Corporation,

Rural Route #1, Box 33,

Rolling Hills via Lomita, California.

In re: Claims for refund of \$5,467.88
5,467.88

For the Year September 30, 1944

Gentlemen:

Reference is made to claim or claims, referred to above, filed by you for the refund of income taxes.

By a Certificate of Overassessment you were advised of an allowance on Schedule of Overassessments numbered IT-147279 for the taxable year referred to, and that to the extent your claim was disallowed, notice would be issued.

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance of your claim or claims, to the extent not previously allowed, is hereby given by registered Mail.

By direction of the Commissioner:

Very truly yours,

(Signed) E. I. McLARNEY,
Deputy Commissioner.

ejm

214M (Rev.)

EXHIBIT 5

Year	Farm & Pasture		Rock & Earth
	Rentals	Crop Sales	Royalties
Calendar year 1931.....	\$10,960.00	\$27,891.03	\$ 9,007.92
Calendar year 1932.....	31,044.49	24,250.87	11,938.10
Calendar year 1933.....	26,799.91	28,428.27	15,521.61
Calendar year 1934.....	29,990.94	35,083.34	20,949.53
Fiscal year ended 9/30/35.....	26,866.13	25,944.11	12,869.38
Fiscal year ended 9/30/36.....	37,128.96	18,486.64	21,044.11
Fiscal year ended 9/30/37.....	35,112.51	18,809.50	49,475.66
Fiscal year ended 9/30/38.....	34,362.62	14,080.17	27,872.82
Fiscal year ended 9/30/39.....	33,388.06	16,189.40	24,158.24
Fiscal year ended 9/30/40.....	34,710.44	14,153.79	28,118.32
Fiscal year ended 9/30/41.....	34,422.85	15,794.75	28,287.08
Fiscal year ended 9/30/42.....	38,283.30	23,250.28	29,621.17
Fiscal year ended 9/30/43.....	8,018.60	42,393.31	36,523.35
Fiscal year ended 9/30/44.....	16,310.43	38,575.52	83,825.81

EXHIBIT 6

Income From Snow Parcel

Years	Snow Sold July 1944
1939-40	\$ 2,267.20
1940-41	1,213.75
1941-42	1,798.27
1942-43	1,410.67
1943-44	3,981.08
1944-45 .....	....
<hr/>	
Total.....	\$10,670.97

EXHIBIT 7

Acreage Sales

Year Ended	Number Sales	Acres	Selling Price
9/30/39	1	15.920	\$ 7,950.00
9/30/40	1	10.235	10,000.00
9/30/41	8	306.828	85,218.93
9/30/42	11	381.244	230,688.78
9/30/43	9	90.649	35,916.09
9/30/44	35	954.426	250,493.67

Subdivision Sales

Number Sales	Acres	Selling Price
13	74.456	\$64,927.71
6	24.326	22,271.01
20	63.876	37,252.50
3	12.278	4,511.22
1	4.055	2,950.00
18	153.718	55,100.00

EXHIBIT 8

GRANT DEED

Palos Verdes Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and having its principal place of business in the County of Los Angeles and State of California, for and in consideration of the sum of Ten Dollars (\$10.00), the receipt whereof is hereby acknowledged, does hereby grant to Audrey O. Snow, a married woman, all that real property, described as follows, to wit:

Those portions of Lot "H" of the Rancho Los Palos Verdes, in the County of Los Angeles, State of California, allotted to Jotham Bixby by decree

of Partition in action "Bixby et al., vs. Bent et al.," Case No. 2373, in the District Court of the 17th Judicial District of said State, in and for said County of Los Angeles, and entered in Book 4, Page 57 of Judgments, in Superior Court of said County, described as follows:

Parcel No. 1.

Beginning at a point in the Westerly prolongation of the Southerly line of the land described in deed to Metropolitan Water District of Southern California, recorded in Book 16113, Page 12, Official Records of said County, distant thereon South $89^{\circ} 59' 01''$ West 220.17 feet from the Southwesterly corner of said land; thence along said Westerly prolongation North $89^{\circ} 59' 01''$ East 220.17 feet to said Southwesterly corner; thence along the Westerly line of said land North $22^{\circ} 55' 55''$ West 819.95 feet to the Northwesterly corner of said land and a point in the Southerly line of Palos Verdes Drive North, 200 feet wide, as described in deed to said County of Los Angeles recorded in Book 12013, Page 277, of said Official Records; thence Westerly along the Southerly line of said Palos Verdes Drive North 895.50 feet to the most Easterly corner of the land described in deed to Abraham Falck Kittel and wife recorded in Book 18638, Page 377, of said Official Records; thence [41] along the Easterly line of said last mentioned land South $28^{\circ} 51' 40''$ West 358.84 feet to the most Northerly corner of the land described in deed to

Abraham Falck Kittel and wife recorded in Book 20371, Page 73, of said Official Records; thence along the Easterly line of said last mentioned land South $2^{\circ} 35' 30''$ East 310.14 feet; thence along the Southerly line of said last mentioned land South $88^{\circ} 13' 20''$ West 188.09 feet to an angle point in the Southeasterly line of the land described in deed to said Abraham Falck Kittel and wife recorded in Book 18638, Page 377; thence along the Southeasterly line of the said last mentioned land following courses and distances: South $75^{\circ} 33' 00''$ West 291.30 feet; South $60^{\circ} 19' 33''$ West 530.38 feet to the most Southerly corner of said land and an angle point in the Southeasterly line of Rolling Hills as per map recorded in Book 201, Pages 29 to 35, of Maps in the office of the County Recorder of said County; thence along said last mentioned line the following courses and distances:

South $32^{\circ} 09' 20''$ West 91.14 feet;
South $76^{\circ} 25' 10''$ West 95.63 feet;
North $83^{\circ} 29' 10''$ West 178.44 feet;
South $66^{\circ} 11' 20''$ West 231.09 feet;
South $75^{\circ} 16' 50''$ West 161.02 feet;
South $37^{\circ} 00' 10''$ West 178.59 feet;
South $55^{\circ} 43' 40''$ West 298.55 feet;
South $32^{\circ} 36' 40''$ West 383.56 feet;
South $67^{\circ} 13' 20''$ West 271.22 feet;
South $7^{\circ} 41' 40''$ West 204.50 feet;
South $49^{\circ} 10' 10''$ West 77.85 feet;
North $45^{\circ} 27' 10''$ West 251.44 feet;

North $57^{\circ} 30' 10''$ West 217.89 feet to the most Northerly corner of the land described in deed to

Jack V. Evans and wife recorded in Book 16862, Page 119, of said Official Records; thence [42] along the exterior boundaries of said last mentioned land the following courses and distances:

South $2^{\circ} 43' 00''$ East 115.54 feet;

South $27^{\circ} 28' 50''$ East 152.98 feet;

South $38^{\circ} 16' 40''$ West 97.13 feet;

North $72^{\circ} 33' 00''$ West 237.07 feet;

North $12^{\circ} 22' 30''$ West 88.12 feet to the most Westerly corner of said last mentioned land and the Southeasterly line of said Rolling Hills; thence along said last mentioned Southeasterly line the following courses and distances:

South $34^{\circ} 55' 30''$ West 63.99 feet;

South $63^{\circ} 43' 20''$ West 263.33 feet;

South $69^{\circ} 03' 40''$ West 350.80 feet;

South $4^{\circ} 00' 00''$ West 423.68 feet;

South $32^{\circ} 58' 40''$ West 370.54 feet;

South $48^{\circ} 22' 55''$ West 113.15 feet;

North $84^{\circ} 11' 15''$ West 222.67 feet;

South $78^{\circ} 19' 30''$ West 240.07 feet;

South $42^{\circ} 54' 25''$ West 285.18 feet;

South $47^{\circ} 13' 10''$ West 527.25 feet;

South $5^{\circ} 00' 00''$ East 217.61 feet to an angle point in said Southeasterly line which is marked by a 2" iron pipe marked RH 50;

Thence South $39^{\circ} 05' 05''$ East 311.59 feet to a 2" iron pipe;

Thence North $39^{\circ} 23' 50''$ East 181.11 feet to a 2" iron pipe;

Thence South $77^{\circ} 14' 10''$ East 241.65 feet to a 2" iron pipe;

Thence North $4^{\circ} 16' 20''$ West 208.41 feet to a 2" iron pipe;

Thence North $9^{\circ} 10' 30''$ East 281.02 feet to a 2" iron pipe;

Thence North $43^{\circ} 27' 55''$ East 177.68 feet to a 2" iron pipe;

Thence North $88^{\circ} 09' 25''$ East 439.86 feet to a 2" iron pipe; [43]

Thence South $39^{\circ} 58' 00''$ East 508.74 feet to a 2" iron pipe;

Thence South $49^{\circ} 51' 00''$ East 447.88 feet to a 2" iron pipe;

Thence South $25^{\circ} 02' 00''$ West 155.57 feet to a 2" iron pipe;

Thence South $68^{\circ} 51' 35''$ West 254.86 feet to a 2" iron pipe;

Thence South $42^{\circ} 16' 10''$ West 269.94 feet to a 2" iron pipe;

Thence South $15^{\circ} 15' 30''$ East 154.86 feet to a 2" iron pipe;

Thence North $88^{\circ} 11' 10''$ East 223.84 feet to a 2" iron pipe;

Thence North $50^{\circ} 47' 50''$ East 151.66 feet to a 2" iron pipe;

Thence North $58^{\circ} 42' 15''$ East 93.05 feet to a 2" iron pipe;

Thence North $44^{\circ} 46' 45''$ East 267.44 feet to a 2" iron pipe;

Thence North $5^{\circ} 23' 00''$ East 205.77 feet to a 2" iron pipe;

Thence North $23^{\circ} 59' 05''$ West 224.77 feet to a 2" iron pipe;

Thence North $54^{\circ} 50' 55''$ West 221.19 feet to a 2" iron pipe;

Thence North $58^{\circ} 51' 40''$ West 109.76 feet to a 2" iron pipe;

Thence North $29^{\circ} 42' 30''$ West 201.72 feet to a 2" iron pipe;

Thence North $12^{\circ} 43' 15''$ West 249.74 feet to a 2" iron pipe;

Thence North $19^{\circ} 10' 30''$ East 54.38 feet to a 2" iron pipe;

Thence North $53^{\circ} 51' 15''$ East 227.13 feet to a 2" iron pipe;

Thence North $73^{\circ} 16' 45''$ East 384.48 feet to a 2" iron pipe;

Thence South $59^{\circ} 41' 50''$ East 389.00 feet to a 2" iron pipe;

Thence South $58^{\circ} 37' 40''$ East 1153.98 feet to a 2" iron pipe;

Thence North $88^{\circ} 19' 20''$ East 435.05 feet to a 2" iron pipe;

Thence South $71^{\circ} 46' 30''$ East 1392.64 feet to a point in the Westerly line of Palos Verdes Drive East, 90 feet wide, as described in deed to said County of Los Angeles recorded in Book 2984, Page 43, Official Records of said County; thence along said last mentioned line the following courses and distances:

Northerly along a curve concave Easterly having a radius of 380.00 feet a radial line of which, passing through said last mentioned point, bears North $81^{\circ} 09' 05''$ West, a distance of 146.42 feet to the Northerly terminus thereof; North $30^{\circ} 55' 30''$ East

53.67 feet [44] to the beginning of a tangent curve concave Westerly and having a radius of 110.00 feet; Northerly along said last mentioned curve 175.28 feet; North $60^{\circ} 22' 30''$ West 169.46 feet to the beginning of a tangent curve concave Easterly and having a radius of 175.00 feet; Northwesterly, Northerly and Northeasterly along said last mentioned curve 424.50 feet; North $78^{\circ} 36' 30''$ East 70.90 feet to the beginning of a tangent curve concave Northwesterly and having a radius of 122.38 feet; Northeasterly and Northerly along said last mentioned curve 203.55 feet to the beginning of a tangent curve concave Southwesterly and having a radius of 265.00 feet; Northwesterly along said last mentioned curve 78.70 feet; North $33^{\circ} 42' 30''$ West 430.62 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 785.67 feet; Northwesterly along said last mentioned curve 225.11 feet to the beginning of a tangent of a tangent curve concave Easterly and having a radius of 270.87 feet; Northerly along said last mentioned curve 151.44 feet to the beginning of a tangent curve concave Southeasterly and having a radius of 205.00 feet; Northeasterly along said last mentioned curve 64.40 feet to a 2" iron pipe;

Thence North $69^{\circ} 36' 25''$ West 170.57 feet to a 2" iron pipe;

Thence North $5^{\circ} 36' 20''$ East 502.48 feet to a 2" iron pipe;

Thence North $12^{\circ} 41' 05''$ West 245.38 feet to a 2" iron pipe;

Thence North $11^{\circ} 11' 25''$ East 287.46 feet to a 2" iron pipe;

Thence North $5^{\circ} 03' 00''$ West 196.01 feet to a 2" iron pipe;

Thence North $71^{\circ} 13' 20''$ East 346.58 feet to a 2" iron pipe;

Thence North $59^{\circ} 26' 00''$ East 356.06 feet to a 2" iron pipe;

Thence North $58^{\circ} 14' 55''$ East 247.14 feet to a 2" iron pipe;

Thence North $74^{\circ} 37' 30''$ East 133.19 feet to a 2" iron pipe;

Thence North $73^{\circ} 38' 25''$ East 287.71 feet to a 2" iron pipe;

Thence North $40^{\circ} 22' 55''$ East 259.56 feet to the point of beginning.

Excepting therefrom that portion described in deed to the Palos [45] Verdes Water Company, as Parcel No. 12, in Book 12886, Page 274, Official Records of said County and that portion described in deed recorded in Book 20675, Page 103, Official Records of said County.

Parcel No. 2.

Beginning at a point in the Easterly line of Palos Verdes Drive East, 90 feet wide, as described in deed to said County of Los Angeles recorded in Book 2984, Page 43, Official Records of said County, said point being the Northwesterly corner of the land described in deed to Julia W. Benson, recorded in Book 19827, Page 288, of said Official Records;

thence along the Easterly and Northerly line of said Palos Verdes Drive East the following courses and distances: Northwesternly along the arc of a curve concave to the Southwest and having a radius of 225.00 feet a distance of 289.88 feet to the Westerly terminus thereof; North $88^{\circ} 36' 30''$ West 97.95 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 135.00 feet; Northwesternly along said last mentioned curve 215.95 feet to the true point of beginning of this description; thence South $86^{\circ} 57' 23''$ East 682.71 feet;

Thence North $55^{\circ} 47' 00''$ East 1209.31 feet;

Thence North $77^{\circ} 22' 00''$ East 1188.78 feet;

Thence South $77^{\circ} 44' 20''$ East 470.93 feet to the Easterly line of said Lot "H"; thence along said last mentioned line North $0^{\circ} 19' 09''$ East 2357.30 feet; thence North $86^{\circ} 29' 50''$ West 992.40 feet to the Southeasterly line of said Palos Verdes Drive East; thence along said last mentioned line the following courses and distances: Westerly along a curve therein concave Northerly and having a radius of 201.77 feet, a distance of 194.57 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 592.46 feet; Northwesternly along said last mentioned curve 165.45 feet;

Thence South $33^{\circ} 43' 30''$ West 256.90 feet to a 2" iron pipe;

Thence South $71^{\circ} 13' 25''$ West 279.88 feet to a 2" iron pipe;

Thence South $52^{\circ} 13' 50''$ West 436.96 feet to a 2" iron pipe; [46]

Thence North $76^{\circ} 12' 15''$ West 160.09 feet to a point in the Easterly line of said Palos Verdes Drive East, said point being the Southerly terminus of a curve therein concave Westerly and having a radius of 1621.72 feet; thence along the Easterly line of said Palos Verdes Drive East the following courses and distances: South $8^{\circ} 28' 00''$ West 356.71 feet to the beginning of a tangent curve concave Northwesterly and having a radius of 310.00 feet; Southeasterly along said curve 218.77 feet to the beginning of a tangent curve concave Northerly and having a radius of 195.06 feet; Westerly along said last mentioned curve 303.68 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 326.45 feet; Northwesterly along said last mentioned curve 195.71 feet; North $7^{\circ} 33' 00''$ West 143.84 feet to the beginning of a tangent curve concave Southeasterly and having a radius of 185.00 feet; Northwesterly along said last mentioned curve 147.56 feet to the beginning of a tangent curve concave Southwesterly and having a radius of 488.07 feet; Northwesterly along said last mentioned curve 188.04 feet; North $75^{\circ} 19' 30''$ West 246.47 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 725.00 feet; Northwesterly along said last mentioned curve 379.40 feet; North $45^{\circ} 20' 30''$ West 131.60 feet to the beginning of a tangent curve concave Southeasterly and having a radius of 115.00 feet; Northwesterly and Southerly along said last mentioned curve 240.69 feet to the beginning of a

tangent curve concave Easterly and having a radius of 180.87 feet; Southerly along said last mentioned curve 101.12 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 695.67 feet; Southeasterly along said last mentioned curve 199.33 feet; South $33^{\circ} 42' 30''$ East 430.62 feet to the beginning of a tangent curve concave Southwesterly and having a radius of 355.00 feet; Southeasterly along said last mentioned curve 105.43 feet to the beginning of a tangent curve concave Northwesterly and having a radius of 212.38 feet; Southerly [47] and Southwesterly along said last mentioned curve 353.25 feet; South $78^{\circ} 36' 30''$ West 70.90 feet to the beginning of a tangent curve concave Easterly and having a radius of 85.00 feet; Southwesterly and Southeasterly along said last mentioned curve 206.18 feet; South $60^{\circ} 22' 30''$ East 169.46 feet to the beginning of a tangent curve concave Westerly and having a radius of 200.00 feet; Southeasterly and Southwesterly along said last mentioned curve 318.70 feet; South $30^{\circ} 55' 30''$ West 53.67 feet to the beginning of a tangent curve concave Easterly and having a radius of 290.00 feet; Southerly along said last mentioned curve 148.13 feet to the beginning of a tangent curve concave Easterly and having a radius of 603.43 feet; Southerly along said last mentioned curve 269.97 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 1136.61 feet; Southeasterly along said last mentioned curve 334.26 feet; South $40^{\circ} 49' 30''$ East 276.14 feet to the beginning of a tangent curve con-

cave Westerly and having a radius of 275.00 feet; Southeasterly and Southwesterly along said last mentioned curve 427.89 feet; South 48° 19' 30" West 94.80 feet to the beginning of a tangent curve concave Easterly and having a radius of 135.00 feet; Southwesterly along said last mentioned curve 106.69 feet to the true point of beginning of this description.

Subject to:

1944-45 taxes.

Restrictions, reservations, covenants, conditions, easements, and rights of way of record.

The above described real property, and each part thereof, is conveyed by grantor subject to the following covenants, conditions, and restrictions, which shall be binding upon grantee, her successors and assigns, and shall exist in favor of grantor, its successors and assigns, and also in favor of the real property, and each part thereof, now owned by grantor adjoining and/or in the vicinity of the [48] real property conveyed hereby and in favor of grantees thereof, and each of them:

1. That there shall never be any mining, quarrying, excavating, or other operations of any kind permitted or maintained on said property for the removal of granite, rock or other earth materials, excepting only excavations for house sites and grading for road or other subdivision purposes.

2. All of the material from excavations for house sites, road grading, or subdivision purposes must be

used and disposed of on the property herein granted and not removed therefrom without permission of grantor.

3. No decomposed granite, rock, or other earth materials of any kind shall ever be hauled off, sold, or removed from said property without the written consent of grantor.

In Witness Whereof, Palos Verdes Corporation has this day of July, 1944, caused its corporate name and seal to be affixed by its officers thereunto duly authorized.

PALOS VERDES CORPORA-
TION,

By.....,
Vice President,

By.....,
Assistant Secretary. [49]

State of California,
County of Los Angeles—ss.

On this day of, 1944, before me,, a Notary Public in and for said County and State, personally appeared A. E. Hanson, known to me to be the Vice-President, and Elgia V. Hurlburt, known to me to be the Assistant Secretary of Palos Verdes Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation

herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.....,

Notary Public in and for said
County and State. [50]

EXHIBIT 9

Rancho Palos Verdes Schedule of Real Property Taxes

Year	Taxes
1935-36	\$ 53,008.53
1936-37	26,951.54
1937-38	62,466.52
1938-39	67,452.95
1939-40	63,061.70
1940-41	56,399.19
1941-42	50,451.93
1942-43	41,643.70
	<hr/>
	\$421,436.06

[Endorsed]: Filed May 1, 1951. [51]

At a stated term, to wit: The February Term. A.D., 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 3rd day of May, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Wm. M. Byrne,
District Judge.

[Title of Cause.]

MINUTE ORDER, MAY 3, 1951

This cause having heretofore been submitted after trial on May 2, 1951, the Court now orders judgment for defendant and directs counsel for Gov't to prepare findings of fact, conclusions of law, and judgment accordingly.

Counsel notified.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The within cause came on regularly to be heard on May 1, 1951, before the Honorable William M. Byrne, United States District Judge sitting without a jury. The plaintiff appeared by its attorneys Riley & Hall and William D. Behnke, and defendant appeared by its attorneys, Ernest A. Tolin, United

States Attorney for the Southern District of California, E. H. Mitchell and Edward R. McHale, Assistants United States Attorney for said District, and Eugene Harpole and Frank W. Mahoney, Special Attorneys for the Bureau of Internal Revenue, and the case having been submitted on a Stipulation of Facts and oral and written evidence and argument of counsel, and the Court, being duly advised, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

This is an action for refund of income tax arising under the provisions of the Internal Revenue Code of the United States. Harry C. [52] Westover, the Collector of Internal Revenue, Sixth District of California, to whom the income tax herein involved was paid in his official capacity as such Collector was not in office at the time of filing of this action, to wit, April 11, 1950.

II.

That on December 15, 1944, plaintiff filed with the Collector of Internal Revenue, Sixth District of California, its Corporation Income and Declared Value Excess Profits Tax Return for the period commencing October 1, 1943, and ending September 30, 1944, and paid to said Collector the sum of \$17,066.36.

III.

In the month of July, 1944, plaintiff sold to one Snow an unsubdivided portion of plaintiff's real

property in the County of Los Angeles, State of California, for the sum of \$90,000.00, consisting of 422.56 acres. Said real property has a cost basis to plaintiff in the sum of \$23,636.93, resulting in a profit or gain of \$66,363.07. During the fiscal year of plaintiff commencing October 1, 1943, and ending September 30, 1944, plaintiff received from said Snow on account of said purchase price of \$90,000.00, the sum of \$27,000.00, and elected pursuant to Section 44 (B) of the Internal Revenue Code to report for income tax purposes said sale upon the installment basis. Said real property was contiguous to the subdivision developed by plaintiff. Said real property sold to Snow was acquired by the plaintiff as part of said 12,245 acres of land transferred to plaintiff as of January 1, 1926, in exchange for its common stock. Said real property has been owned and held by plaintiff since said date, to wit: January 1, 1926.

IV.

That plaintiff filed its claim for refund in the amount of \$5,467.88, on May 9, 1945, and again on October 30, 1946, alleging that the income from the sale of property to one Snow was a capital gain and not ordinary income as originally reported by plaintiff. By letter dated August 4, 1949, the Commissioner of Internal Revenue disallowed said claim for refund. [53]

V.

That plaintiff is a corporation organized November 27, 1925, under the laws of the state of Delaware

with its principal office and place of business located in the City of Wilmington, County of Newcastle, Delaware. Since 1926, plaintiff has transacted and is doing business in the County of Los Angeles, State of California. Plaintiff took over from Palos Verdes Syndicate as of January 1, 1926, approximately 12,245 acres of land in the County of Los Angeles, State of California, with other assets, giving in exchange therefor 54,000 shares of its common stock, having an aggregate par value of \$5,400,000, issued pro rata to the members of the Syndicate as their interests appeared. Said land was known as "Rancho Palos Verdes."

VI.

That said "Rancho Palos Verdes" originally comprised approximately 16,004 acres of unimproved real property in the County of Los Angeles. It was acquired by a group of persons known as the Palos Verdes Syndicate in the year 1913. It consists of very little level land. It rises from the ocean to an elevation of some 1400 feet in a matter of possibly two or two and one-half miles, and slopes down again to the plains on the inland side. Some of it is suitable for farming, and some of it is made of arroyos and precipitous parcels that are not available for farming. After acquisition, the Palos Verdes Syndicate appointed a general manager to operate and manage the Rancho, and it engaged in incidental farming activities. After holding the land for a period of ten years, the Palos Verdes Syndicate decided to

sell the whole parcel, and entered into an agreement to sell in the year 1923. The whole sale was not consummated by reason of the fact that the purchaser was unable to raise sufficient monies to buy the whole rancho. Two portions of the rancho were actually sold, to wit: 3000 acres in the northerly and westerly edges of the Rancho, and 200 acres on the southerly and easterly edges of the Rancho, and this land was deeded to the Bank of Italy, in trust, for subdivision and development purposes. Said portions were later subdivided [54] and developed and handled by the Bank of Italy and became known as "Palos Verdes Estates" and "Miraleste," respectively. Neither the Palos Verdes Corporation nor the Palos Verdes Syndicate had any further interest therein from the date of sale.

VII.

That the corporation leased out for farming purposes that part of its land that was suitable therefor, throughout the years in question.

VIII.

That the corporation leased some portions of its land for quarrying rock and mining diatomaceous earth and realized royalties therefrom. That the sale of decomposed granite was in such a manner that it would not interfere with the later subdivision of the property.

IX.

That the income from farming operations and from rock and earth royalties was insufficient to pay

the county real estate taxes; and the taxes for the years 1935 to 1943, were unpaid at the date of the sale involved in this action.

X.

That the plaintiff subdivided part of its land and offered the same for home sites and called said section "Rolling Hills"; and that prior to the actual subdivision of this parcel within the meaning of state and county laws, the plaintiff sold portions of this section as acreage for residential purposes.

XI.

That the affairs of the corporation were handled by a managing vice-president, and said vice-president rendered an annual report to the shareholders.

XII.

That said annual reports indicated that the only financial solution for plaintiff was to sell its lands, as farming was unprofitable; and that from the year 1935, to date the plaintiff attempted to and did sell all the property which could be sold. [55]

XIII.

That plaintiff caused to be distributed to the public certain leaflets or brochures describing the land it held; that part of these brochures were confined to that section known as "Rolling Hills Subdivision," while other leaflets described the balance of the unsubdivided property of plaintiff known as "acreage." Leaflets and brochures relating to the

whole ranch were distributed not earlier than the year 1937.

XIV.

That in the year 1940, 10,000 postcards were mailed to the public in Los Angeles offering to sell land at \$185.00 per acre. These cards referred to certain land on the northern periphery of the Rancho; however plaintiff would have sold any other portion of its land that could have been made the subject of an advantageous sale.

XV.

That between 1940 and 1944, the plaintiff made varied and vigorous efforts to dispose of all its real estate holdings to various agencies of the state and Federal government and caused to be made plats showing the area laid out for park purposes.

XVI.

That plaintiff sold during the fiscal year ended September 30, 1944, both subdivided land and unsubdivided portions of its property, and that sales of its unsubdivided portions greatly exceeded in number its subdivision sales.

XVII.

That during the fiscal year ended September 30, 1944, the plaintiff in addition to the Snow sale made 34 other sales of unsubdivided land totalling 531.859 acres and reported these sales as ordinary income.

XVIII.

That all sales of unsubdivided real property were subject to restrictions in the deed preventing use of the property except for residential purposes.

XIX.

That although plaintiff made 34 additional sales of unsubdivided [56] property in the fiscal year ending September 30, 1944, which were reported as ordinary income, it has not at any time contended that this acreage represented a capital asset.

XX.

That between the period from September 30, 1939, to September 30, 1944, the sales of unsubdivided lands increased and outnumbered the sales of subdivided property.

XXI.

That the plaintiff in leasing its land for farming purposes, reserved the right to enter the leased portion for the construction of roads, pipe lines and power lines.

XXII.

That the plaintiff was willing to sell all or any portion of its unsubdivided properties, that could be made the subject of an advantageous sale.

XXIII.

That the plaintiff in its Corporation Income & Declared Value Excess Profits Tax return for the fiscal year ending September 30, 1944, stated that it was in the real estate business.

XXIV.

That the plaintiff was engaged in the real estate business.

XXV.

That the plaintiff was continuously engaged in the sale of its subdivided and unsubdivided portions of its property.

XXVI.

That the plaintiff rented the property for farm purposes to realize what income it could, until the land could be sold.

Conclusions of Law

I.

That the plaintiff advertised all of its property for sale to the general public and was willing at all times to sell a portion of all of [57] its unsubdivided realty.

II.

That the parcel of land sold to one Snow in July, 1944, was not a capital asset nor an asset used in plaintiff's trade or business, but was held primarily for sale to customers in the ordinary course of business.

It Is Therefore Ordered that defendant is entitled to a judgment against plaintiff with costs of suit assessed against plaintiff.

Dated this 10th day of July, 1951.

/s/ WM. M. BYRNE,

United States District Judge.

Approved as to Form:

RILEY & HALL,

By /s/ WILLIAM D. BEHNKE,
Attorneys for Plaintiff.

[Endorsed]: Filed July 10, 1951. [58]

The United States District Court Southern District
of California, Central Division

No. 11,417-WB

PALOS VERDES CORPORATION, a Corpora-
tion,

Plaintiff.

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The within cause came on regularly to be heard on May 1, 1951, in the above-entitled court, the Honorable William M. Byrne, United States District Judge, presiding without a jury. The plaintiff appeared by its attorneyes Riley & Hall and William D. Behnke, and the defendant appeared by its attorneys, Ernest A. Tolin, United States Attorney for the Southern District of California, E. H. Mitchell and Edward R. McHale, Assistants United States Attorney for said District, and Eugene Harpole and Frank W. Mahoney, Special Attorneys

for the Bureau of Internal Revenue. The Court having heard the facts and argument presented and having heretofore made and caused to be filed herein its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed that defendants have and recover judgment from the plaintiff and that costs [59] of suit in favor of defendant and against plaintiff be taxed by the Clerk of this Court in the sum of \$.....

Dated this 10th day of July, 1951.

/s/ WM. M. BYRNE,

United States District Judge.

Approved as to Form:

RILEY & HALL,

By /s/ WM. D. BEHNKE,

Attorneys for Plaintiff.

[Endorsed]: Filed July 10, 1951.

Docketed and entered July 10, 1951. [60]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above-Named Defendant, The United States of America, and Its Attorneys, Ernest A. Tolin, United States Attorney, E. H. Mitchell and Edward R. McHale, Assistant U. S. Attorneys, and Eugene Harpole and Frank W. Mahoney, Special Attorneys, Bureau of Internal Revenue, 600 Federal Building, Los Angeles 12, California:

You, and Each of You, are Hereby Advised that the Plaintiff, Palos Verdes Corporation, a Corporation, Plaintiff in the above-entitled action, does hereby appeal from the judgment entered July 10, 1951, in the above-entitled action.

Dated this 18th day of July, 1951.

RILEY AND HALL,

By /s/ MARSHALL D. HALL,
Attorneys for Plaintiff.

[Endorsed]: Filed July 28, 1951. [61]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to and in accordance with Rule 75, Federal Rules of Civil Procedure, the plaintiff and appellant in the above-entitled matter hereby designates as the Record on Appeal to the Court

of Appeals, Ninth Circuit, the complete record and all proceedings and evidence in the above-entitled action, consisting of the following:

1. Plaintiff's Complaint on file herein;
2. Defendant's Answer on file herein;
3. Stipulation of Facts on file herein, together with all exhibits attached thereto;
4. Reporter's Transcript of Proceedings on file herein;
5. Plaintiff's exhibits, consisting of numbers one (1) to ten (10) inclusive;
6. Defendant's exhibits, consisting of A1, A2, A3, A4, B, C, D, [62] E, F, G, H, I, J, K and L;
7. Findings of Fact and Conclusions of Law on file herein;
8. Judgment on file herein;
9. Notice of Appeal on file herein;
10. Plaintiff's and Appellant's Designation of Record on Appeal.

Respectfully Submitted:

RILEY AND HALL,

By /s/ WILLIAM D. BEHNKE,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 16, 1951. [63]

[Title of District Court and Cause.]

COUNTER DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Comes Now the defendant-appellee United States of America and hereby designates in addition to those portions of the record and proceeding in the above-entitled case designated by plaintiff-appellant herein, the following portions of the record and proceeding to be contained in the record on appeal of this case to the United States Court of Appeals for the Ninth Circuit:

1. The Minute Order of the Court dated May 3, 1951.

2. Defendant's Exhibit A.

Dated August 22, 1951.

ERNEST A. TOLIN,

United States Attorney,

E. H. MITCHELL, and

EDWARD R. McHALE,

Assistant U. S. Attorneys,

EUGENE HARPOLE, and

FRANK W. MAHONEY,

Special Attorneys, Bureau of
Internal Revenue,

By /s/ EUGENE HARPOLE,

Attorneys for Defendant-Appellee, United States
of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 22, 1951. [65]

[Title of District Court and Cause.]

MOTION FOR ORDER, AND ORDER EXTENDING TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL

Plaintiff and appellant in the above-entitled matter moves for an order extending the time for filing the Record on Appeal and docketing the appeal to a time ninety (90) days from the date of filing the Notice of Appeal upon the following grounds:

1. The time prescribed under Rule 72(g) F.R.C.P., for filing the Record on Appeal and docketing the appeal will expire in the above-entitled matter forty (40) days from July 28, 1951, to wit: September 6, 1951.

2. It appears that the Clerk will or may be unable to prepare the Record on Appeal in time for filing a docketing prior to September 6, 1951.

3. Under the provisions of Rule 72(g) F.R.C.P., the District Court in its discretion, with or without motion or notice, may extend the time for filing of the record and docketing of the appeal if the order for extension is made prior to the expiration of the original period prescribed for the filing of the record and docketing of the appeal provided that the time shall not be [67] extended to a date more than

ninety (90) days from the date of filing the first Notice of Appeal.

Respectfully submitted,

RILEY AND HALL,

By /s/ WILLIAM D. BEHNKE,
Attorneys for Plaintiff.

ORDER

Good cause being shown, it is hereby ordered that the time for the filing of the record and docketing of the appeal in the above-entitled matter be, and the same is hereby extended to Oct. 26, 1951.

Dated August 29, 1951.

/s/ JAMES M. CARTER,
District Judge.

Presented by:

/s/ WILLIAM D. BEHNKE.

[Endorsed]: Filed Aug. 29, 1951.

United States District Court for the Southern
District of California, Central Division

No. 11417-WB-Civil

PALOS VERDES CORPORATION, a Corpora-
tion,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

May 1, 1951, 10:15 A.M.

Before: Honorable Wm. M. Byrne,
Judge Presiding.

Appearances:

RILEY AND HALL, by
WILLIAM D. BEHNKE, ESQ.,

On behalf of Plaintiff.

ERNEST A. TOLIN,
United States Attorney,

E. H. MITCHELL, and

EDWARD M. McHALE,

Assistant United States Attorneys,

EUGENE HARPOLE, and

FRANK W. MAHONEY,

Special Attorneys, Bureau of Internal
Revenue, by

FRANK W. MAHONEY, ESQ.,

On Behalf of Defendant.

Deputy Clerk Drew: Case No. 11417-WH-Civil,
Palos Verdes Corporation vs. United States of
America, for trial.

Mr. Behnke: We are ready for the Plaintiff,
your Honor.

Mr. Mahoney: We are ready for the Defendant,
your Honor.

The Court: You may proceed.

Mr. Behnke: Your Honor, we have filed a Stipulation of Facts which I think has been presented to your Honor.

The Court: It was just filed this morning.

Mr. Behnke: Yes, we filed a Stipulation of Facts. Would you want time to look those over?

The Court: Yes, if you will just let me glance through them.

(A short intermission follows while the Court examines said document.)

The Court: All right, you may proceed.

Mr. Behnke: Thank you, your Honor. Mr. Benedict, take the stand, please.

HARRY E. BENEDICT

called as a witness herein on behalf of the Plaintiff,
being first duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Behnke:

Q. (By Deputy Clerk Drew): Your full name, please? [2*]

A. Harry E. Benedict.

Q. (By Mr. Behnke): Mr. Benedict, where do you reside?

A. Scarborough, New York.

Q. Do you also have a home here in California?

A. Yes, sir.

Q. And where is that located?

A. On Portuguese Bend, on the Palos Verdes Ranch.

Q. And are you now Chairman of the Board of Directors of the Palos Verdes Corporation?

A. Yes, sir.

Q. Have you been a member of the Board of Directors for a considerable period of time?

A. Since the Corporation was organized.

Q. That is since approximately 1926?

A. Yes, sir.

Q. And have you served in other capacities besides the Chairman of the Board of Directors?

A. I believe I at one time held the office of Treasurer or I was President for a time.

Q. And have you taken an active part in the affairs and operations of the Corporation?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Harry E. Benedict.)

A. Yes, sir.

Q. And have you regularly attended the meetings of the Boards of Directors?

A. Substantially all of them. [3]

Q. Did you know Mr. Frank A. Vanderlip, Sr.?

A. Yes, sir.

Q. When did you first know him?

A. Oh, I would say in 1916.

Q. And did you become associated with him in a business way? A. I did.

Q. Did you continue this association during Mr. Vanderlip's life? A. I did.

Q. When did Mr. Vanderlip die?

A. In 1937.

Q. At that time was Mr. Vanderlip, Sr., president of the Palos Verdes Corporation?

A. I believe he was, yes, sir.

Q. Had he served in that capacity for a number of years? A. Yes, sir.

Q. Are you familiar, through your business association with Mr. Vanderlip, with the purchase of the Rancho Palos Verdes?

A. The purchase was made before my association with him.

Q. First, let me ask you: Are there any members of the original Palos Verdes syndicate now alive? A. I believe one is. [4]

Q. Is that Mr. Andrew Mills? A. Yes, sir.

Q. And he is very aged, is he not?

A. Well, he is perhaps in his middle or late seventies, I should think.

(Testimony of Harry E. Benedict.)

Q. And he is out of this State?

A. Yes. He is in New York.

Q. Regarding the first Palos Verdes syndicate, who were the members of the Palos Verdes syndicate, originally?

A. I don't know that I can, without reference to records, name all of them. I could name the leading ones very easily.

Mr. Behnke: I have here, your Honor, a document which I would like the witness to identify. Do you want to see this? (Mr. Behnke shows document to Mr. Mahoney.)

Mr. Mahoney: Yes.

Mr. Behnke: I have here a document——

Mr. Mahoney: Just a moment, Mr. Behnke. Your Honor, it would appear that this line of questioning at the present time is immaterial to the question of liability of the Corporation.

Mr. Behnke: Well, your Honor, the purpose of this testimony is to show that there is a continuity of beneficial ownership in this land from its inception right down to the present time; that the same people or their heirs continued to hold the interests, regardless of the [5] form in which the real property was held. It is for that purpose that I want to show that the whole history of this Ranch is one continuous history relating to the present taxable year.

The Court: What is the materiality of that, counsel?

Mr. Behnke: I would like to show, your Honor.

(Testimony of Harry E. Benedict.)

that this land was originally acquired by the syndicate as an investment and that it has continued down through the years to be an investment, and that the syndicate transferred to the Corporation, in 1926, this land and continued on; and on the historical background I am going to try to be as brief as possible, but I do think it is material, your Honor.

The Court: I understand that the Plaintiff acquired the land in 1927 from the members of the syndicate.

Mr. Behnke: In 1926, your Honor.

The Court: In 1926, from the members of the syndicate; and who the members of the syndicate were or the purpose for which the members of the syndicate held the land is immaterial.

Mr. Behnke: The formation of the Corporation would be very material evidence of the purposes of the formation of the Corporation with respect to this land.

The Court: That is right, and you may go into the matter of the incorporation and pick it up from the time the Corporation came into existence. [6]

Mr. Behnke: Very well, your Honor. May I just ask one question about the date of acquisition by the syndicate:

In what year was the property acquired by the syndicate, Mr. Benedict?

A. Well, the records indicate I believe it was in the year 1913.

(Testimony of Harry E. Benedict.)

Q. And was this property subsequently sold by the syndicate?

A. Well, it was transferred to the Palos Verdes Corporation in 1926—if I understand your question correctly.

Q. Prior to that time, was there any portion of the Rancho Palos Verdes sold? A. Yes.

Q. In what year did that sale occur?

A. In 1923, I believe.

Q. To whom was that sale made?

A. I believe it was made in the name of a trust. I am familiar with the transaction, but I believe it was sold to a trust.

Mr. Behnke: For identification purposes, I wonder if this could be marked Plaintiff's Exhibit No. 1.

(Whereupon a map was marked as Plaintiff's Exhibit No. 1 for identification.)

Deputy Clerk Drew: That is Exhibit No. 1, [7] for identification.

Q. (By Mr. Behnke): I have a map, Mr. Benedict, which purports to be of the Palos Verdes Estates. Could you delineate the portion which composed the whole Ranch, at this time? This map I think is dated 1924.

A. The boundaries of the Ranch held by the syndicate began here in the city of Los Angeles and came out here (indicating on Exhibit No. 1), down striking the ocean, continuing around the

(Testimony of Harry E. Benedict.)

ocean and then following up here (indicating on said map).

Q. Was there an agreement to sell the whole parcel by the syndicate in 1923? A. Yes, sir.

Q. Was the whole sale consummated?

A. No, sir.

Q. What portions of the ranch were left in the syndicate after the transaction?

A. Well, substantially $1/5$ of the original total area was sold.

Q. And could you point out on the map here what portions were sold and the amount of the sale?

A. This portion outside of that line (indicating on map) was sold, and 200 acres on the east border was sold, making a total of 3200 acres.

Q. And this was later subdivided, was it not? [8] (Mr. Behnke indicates on map, Exhibit No. 1.)

A. Yes, sir.

Q. And became known as Palos Verdes Estates?

A. Yes.

Q. And this became known as Miraleste (indicating on said map, Exhibit No. 1)?

A. Miraleste.

Q. And has either the Corporation or the syndicate ever had any further interest in these two parcels from the date of sale? A. No, sir.

Q. And what was the ultimate price that was paid for that 3200 acres?

The Court: Counsel, may I interrupt for a minute. I think I should call attention of counsel to this matter: I don't think it makes any difference,

(Testimony of Harry E. Benedict.)

but if counsel feel that it does, I wish you would so indicate. I take it, from the trial briefs, that the particular portions that you are referring to now have nothing to do directly with the matter in controversy here. However, I think that this portion which you are referring to at the present time was deeded to the Bank of Italy, as Trustee, and that it was a subdivision that was handled by the Bank of Italy. About twenty-five years ago I was an assistant trust officer of the Bank of Italy, which had something to do with this subdivision. Now, as I understand, the [9] issues in this case have nothing at all to do with that and your inquiries here now are merely of a preliminary nature.

Mr. Behnke: That is correct.

The Court: But, if counsel feel that the facts as I have stated them in any way are prejudicial, I wish you would so indicate, so we can dispose of this case in another manner.

Mr. Behnke: I have no objection.

Mr. Mahoney: The defendant has no objection, your Honor.

The Court: It is true that that piece, that property was deeded to the Bank of Italy?

Mr. Behnke: It is, your Honor.

The Court: And the subdivision was handled by the Bank of Italy——

Mr. Behnke: It is, your Honor.

The Court: That is the same property that I have reference to, but it is not involved at all in this case?

(Testimony of Harry E. Benedict.)

Mr. Behnke: No; it is not. It is merely a preliminary matter, as your Honor has indicated.

Q. Mr. Benedict, can you identify this photograph? A. Yes, sir.

Q. Could you tell me when that photograph was taken? [10]

A. I don't now the exact date, but it was around 1945. I should think.

Q. In your opinion, is that a faithful and correct representation of the Rancho Palos Verdes as at that time?

A. It is a photograph. I should assume it would have to be.

Mr. Behnke: I would like to have this marked as Plaintiff's Exhibit No. 2 and introduced into evidence.

The Court: It will be so marked and received.

(Said photograph, so offered and received in evidence, was marked as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Behnke): Mr. Benedict, the Palos Verdes syndicate, the owners of this land, formed a corporation in 1925, I believe it was. Could you tell me the reasons for the formation of the Corporation at that time?

A. Well, as I knew them, they were that the property had been held in a syndicate which was a very loose form particularly as to the administration of the property and, in the meantime, since the syndicate had been formed, one or more of the

(Testimony of Harry E. Benedict.)

original syndicate members had died; whereupon estates were involved in the administration, and it had seemed to me at that time, [11] and in which Mr. Vanderlip concurred and approved, that the matter should be incorporated for the usual purposes of incorporating a matter of that kind.

Q. And was the remaining portions of the Rancho transferred to the Corporation?

A. Yes, sir.

Q. And stock issued in connection therewith?

A. Yes, sir.

Q. After the formation of this corporation, what were its activities?

A. Well, there were no changes in the activities upon incorporation. It continued to act as the holder of title. It continued to farm the property. There were relatively few other activities at that time than farming.

Q. Was there a manager appointed?

A. Yes, sir.

Q. Who was that manager?

A. Mr. J. Lawyer.

Q. What were his duties as manager?

A. He made contacts with farmers, sharecroppers, and some cash farming rentals. He looked after the payment of taxes, in so far as probably discussions with the assessors as to valuations, and matters of that kind. His duties were not very complicated at that [12] time.

Q. What was the character of the land that the Corporation acquired?

(Testimony of Harry E. Benedict.)

A. The first comment would be that there was very little level land. It rises from the ocean to an elevation of some fourteen hundred feet, in a matter of possibly two or two and a half miles and slopes down again to the plains on the inland side. Some of it is suitable for farming and some of it is made up of arroyos and precipitous parcels that are not available for farming.

Q. And over the period of years the Corporation has derived income from the farming activities?

A. Yes, sir.

Q. And from the development of its mineral sources? A. Yes, sir.

Q. And for those amounts, your Honor, we do not have the corporate history, but we do have it for the years of 1931 down through the taxable year involved. That is Exhibit 5.

In this matter of the development of its natural resources, what natural resources were found upon the Ranch?

A. Diatomaceous earth was one of the important natural resources, and contracts or agreements were entered into with operators mining diatomaceous earth a great many years back. At one time, mud or silt for use in oil well [13] drilling was a modest enterprise. Then, in recent years the quarrying of rock has become an important and substantial activity.

Q. Was this Corporation formed for the purpose of subdividing and developing this real property?

(Testimony of Harry E. Benedict.)

A. No. That was not in the minds of any of us, with which I am familiar.

Mr. Mahoney: Just a moment, Mr. Benedict. I would like to object to that question, on the ground that the intent of incorporation can be ascertained from the Articles of Incorporation and not from the conclusion of the witness.

The Court: Yes.

Mr. Behnke: It is not the sole evidence, though, as to intent, your Honor.

The Court: The purpose of the formation of the Corporation must be set out in your Articles of Incorporation, so you must have them set out in your Articles of Incorporation. That is the best evidence as to the purpose. Now, of course, as to what actually happened, you can introduce evidence as to that.

Mr. Behnke: Yes.

The Court (Continuing): As to what actually occurred. But the purpose of the formation of the Corporation should be set out in your Articles of Incorporation.

Mr. Mahoney: Can we have the answer to that stricken, [14] your Honor?

The Court: What is that?

Mr. Mahoney: Can we have the answer to the last question stricken, your Honor?

The Court: Yes.

(Mr. Behnke shows document to Mr. Mahoney.)

(Testimony of Harry E. Benedict.)

Q. (By Mr. Behnke): I have here, Mr. Benedict, a document which purports to be the Certificate of Incorporation of the Palos Verdes Corporation. Will you examine this document?

The Court: I would imagine that counsel has perhaps seen that and investigated it.

Mr. Behnke: Yes.

The Court: And if it is the Articles——

Mr. Behnke: We can stipulate to it.

The Court: You can stipulate to that and save some time.

Mr. Mahoney: They are substantially the same or they appear to be the same as filed with the County Clerk. We will stipulate that they may be introduced as the Articles of Incorporation, of the Palos Verdes Corporation.

Mr. Behnke: Thank you. Would you mark this as Plaintiff's Exhibit No. 3.

The Court: Are you offering it in evidence?

Mr. Behnke: Yes. I am offering it in evidence, your Honor. [15]

The Court: It may be received.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit No. 3.)

(Testimony of Harry E. Benedict.)

PLAINTIFF'S EXHIBIT No. 3

Certificate of Incorporation of Palos Verdes Corporation

First: The name of the Corporation is Palos Verdes Corporation.

Second: The principal office and place of business of the Corporation in the State of Delaware is to be located at No. 7 West Tenth Street, in the City of Wilmington, County of Newcastle; and the name of its resident agent in charge thereof is The Corporation Trust Company of America, No. 7 West Tenth Street, Wilmington, Delaware.

Third: The nature of the business and the objects and purposes to be transacted, promoted and carried on are:

To buy, acquire, hold, own, maintain, sell, convey and generally deal in, manage, lease, mortgage, encumber, exchange and otherwise dispose of real estate and real property of all kinds or any interest or right therein; to carry on the business of developing and improving real property; to lay out for public and private use roads, streets, avenues, or highways, upon or through its lands; to extend, continue or connect such roads, streets, avenues or highways upon or through other real property to be acquired; to lay out and establish such roads, streets, avenues or highways, and the extensions, continuations or connections thereof, and to construct drains or sewers, and such bridges or culverts

(Testimony of Harry E. Benedict.)

as may be necessary to maintain the grades of, or for the extension, continuation or connection of the roads, streets, avenues or highways so laid out; to connect such roads, streets, avenues or highways belonging to any other corporation or person; to act as brokers, agents and adjusters in the business of any kind or class of insurance in any or all of its branches, including marine insurance, fire insurance, life insurance, accident and health insurance, casualty insurance, workmen's compensation insurance, fidelity insurance, insurance against loss by defaults, whether willful or otherwise, in the fulfillment of contracts, insurance against loss because of fraud, theft, robbery or any kind of misconduct, rent insurance; to produce, drill for, purchase, store, refine and deal in petroleum and its products at both wholesale and retail, and to manufacture all or any of the products of petroleum, and packages for holding the same; to acquire water by purchase, development or otherwise. construct reservoirs or water towers, erect pumping machinery, lay water mains, pipes, gates, valves and hydrants, furnish and sell water to manufactories, private corporations and individuals for fire protection, manufacturing and domestic use, and collect payment or rentals for the same; to manufacture and supply gas and electricity for lighting streets, roads, lanes, alleys, parks and public and private buildings.

Received in evidence May 1, 1951.

(Testimony of Harry E. Benedict.)

Mr. Behnke: I don't think I offered Plaintiff's Exhibit No. 1 in evidence. May I offer that in evidence, too.

The Court: It will be received.

(Said map was thereupon received in evidence by the Court, as aforesaid, and marked as Plaintiff's Exhibit No. 1.)

Q. (By Mr. Behnke): After the formation of the Corporation did the Corporation subdivide any portions of this land?

A. No; not at that time.

Q. Were there any sales made of the land during the years following the incorporation?

A. Well, as to the chronology, there were certain parcels sold. I believe the parcel sold to the United States Government for the lighthouse was previous to the incorporation.

Q. The answer is yes, there were parcels sold subsequent to that time?

A. Yes, there were parcels sold.

Q. Now, the income which was derived from the farming and mineral development, was that sufficient to pay the taxes at that time? [16]

A. It might have been in some one certain year, but over a period of years it was not sufficient.

Q. When was the first time that the Corporation actually subdivided any portion of the Ranch?

A. I believe it was around 1934 or '35.

Q. Could you relate the circumstances surrounding that project?

(Testimony of Harry E. Benedict.)

A. The situation as to real estate as it affected the Ranch was very slow, in a depressed state, during the years preceding that and the manager felt that possibly he could take an area in the Ranch that was in the main not suitable for farming and that possibly he could encourage people to buy what he termed Dude Ranches of from one to four or five acres, and accomplish two things: He might produce some funds for the Corporation and he would also take some very rough and unproductive land off our tax roll; and that was the genesis of that operation.

Q. Did the Corporation incur financial difficulties during this period of time?

A. Yes. Our taxes began to accumulate a little faster than we had funds to pay them and a substantial tax accumulation occurred, something like \$450,000.00, and Mr. Vanderlip died in 1937 and he had, in the years previous to his death, from time to time, purchased [17] additional land around the parcel he owned, on the other side of the ranch, to provide funds when we needed them, and the financial conditions of the '30s were such that this became burdensome to him and he did not feel able to continue to purchase land and to supply funds for the Corporation; and after his death, this tax matter became acute.

Q. Were the taxes delinquent on the real property from 1935 through 1944?

A. I can't answer as to the exact number of years there, but that was the approximate period.

(Testimony of Harry E. Benedict.)

Q. In the Stipulation of Facts we have it (Exhibit No. 9) as the taxes for those years. (Document handed to the witness.) Does that refresh your recollection?

A. Yes. The accumulated total I am familiar with, and that is from 1935-1936 through 1942-1943.

Q. Now, this portion that was subdivided, was a regular subdivision plat made of that portion?

A. My memory is that this was an acreage matter. I believe there is a distinction, isn't there, in Los Angeles County? These were sold in acreage parcels, I believe.

Q. But they were platted out on plat?

A. I would assume so. I don't know.

Q. And were improvements put into this subdivision [18] project? A. Yes.

Q. What was this project known as?

A. Rolling Hills.

Q. Was water developed in connection with it?

A. Yes, a mutual water company was formed.

Q. Was that the Rancho Mutual Water Company? A. Yes, sir.

Q. And the Corporation proceeded to sell those over the period of years down through the taxable year involved here? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And at the same time, other sales were made outside of this subdivided portion, were they, in acreage parcels? A. Yes, sir.

Q. Did the Corporation place any "For Sale"

(Testimony of Harry E. Benedict.)

signs on the portions of the Ranch outside of the Rolling Hills project?

A. I believe in no instances. We were rather insistent that there be no "For Sale" signs on the Rancho.

Q. And was this property ever listed with outside brokers? A. I believe not. [19]

Q. Except for 1944, were any prices ever fixed in advance upon any acreage parcels in the Ranch outside of the Rolling Hills project?

A. To my knowledge, there never was.

Q. How did these sales occur that were made?

A. The inquiries came from various sources to us for parcels of land, such as sales to the Federal Government in two or three instances; and some sales were made in acreage parcels by interested people.

Q. Did the Corporation make any improvements upon such parcels prior to their sale, in order to sell them?

A. No. I think in no instance we did.

Q. Would you say that the only thing the Corporation did would be to measure out in metes and bounds, or whatever legal description may have been necessary, to delineate those portions?

A. Yes.

Q. What improvements, in a general way, were made in connection with this real property, by the Corporation, after its acquisition?

A. Some roads were built and very little else

(Testimony of Harry E. Benedict.)

was done by the Corporation up to the Rolling Hills project.

Q. There were no real estate offices ever constructed on the portions outside of the Rolling Hills area—— A. No. [20]

Q. (Continuing): Were there?

A. No, sir.

Q. The Corporation did not employ real estate brokers in connection with the sale of their real property, did they, outside of the Rolling Hills project? A. No, sir.

Q. Were there efforts made by the Corporation to dispose of the whole real property holdings owned by the Corporation? A. Yes, sir.

Q. What efforts were made to dispose of this real property?

A. Well, you possibly want to start with after the incorporation. Of course, the whole property was offered for sale at the time the Bank of Italy Trust made the purchase of the first portion; all of it was offered for sale at that time.

Q. That is, by the syndicate?

A. That is right.

Q. In 1923?

A. That is right. Now, after the incorporation, I should think around 1940, an offer was made of all of the remaining property substantially, for park purposes, to the County or to the State or to a combination of the County and the State and possibly interests in the Federal Government, an

(Testimony of Harry E. Benedict.)

offer was made and efforts were made to [21] consummate the sale——

Q. And were those made through the General Manager of the Corporation? A. Yes.

Q. Who was that General Manager of the Corporation?

A. Mr. A. E. Hanson was General Manager at that time.

Q. Is he any longer in the employ of the Corporation? A. No; he is not.

Q. What efforts did he make in connection with the disposal of the whole of the real property?

A. I think he made very vigorous and continuous efforts, by consulting County officials and having them out to look at the property; I believe he contacted various State officials and my memory is that he also discussed the matter with some people in Washington. He made a vigorous effort to consummate it.

Q. And was this sale to have been made in the condition in which the land then was?

A. Yes, sir.

Q. Prior to the incorporation, there was a road put in by the syndicate, was there?

A. Yes, sir, around the Coast.

Q. I will produce more exact information on this later, your Honor. Could you roughly indicate at the present time where that road went, on the photograph here? [22]

A. The part held by the Bank of Italy Trust stops somewhere around here (indicating) and the

(Testimony of Harry E. Benedict.)

syndicate picked up the Coast Highway somewhere in there (indicating) and brought it on around and up to this grapevine here (indicating) and down through here (indicating) in connection with the roads at the inland side of the property. It was really across two sides of a rectangle.

Q. And that was put in approximately what year?

A. Approximately 1924, it must have been done.

Q. During the taxable year that is involved, was the Corporation willing to dispose of all of its remaining holdings of land?

The Witness: Of what year are you now speaking?

Mr. Behnke: 1944.

A. Yes. In the offer to the County, the State or to the Federal Government at that time, all of it was offered for sale.

Mr. Behnke: I have here a certified copy of a Resolution of the Board, which I should like to have marked as Plaintiff's Exhibit No. 4 for identification. There is a copy. (Mr. Behnke hands document to Mr. Mahoney.)

Deputy Clerk Drew: Is this the one you are offering?

Mr. Behnke: No. That is just a copy for his Honor, if he cares to see it prior to my offering it. [23]

Q. And would you read that resolution?

A. I have read it.

(Testimony of Harry E. Benedict.)

Q. Can you identify the signature of the Assistant Secretary of the Corporation thereon?

A. Yes, sir.

Q. And is that the seal of the Corporation (indicating on said document)?

A. Yes, sir.

Q. And was that the Resolution adopted by the Board of Directors in their meeting in January of 1944?

A. That is right.

Q. January what?

A. The 24th of January.

Q. January 24th?

A. Yes, sir.

Mr. Behnke: I would like to offer this into evidence as Plaintiff's Exhibit No. 4.

The Court: It will be received in evidence.

Deputy Clerk Drew: Exhibit No. 4 in evidence.

(Said document, so offered and received in evidence, as aforesaid, was marked Plaintiff's Exhibit No. 4.)

PLAINTIFF'S EXHIBIT No. 4

Resolved: That the Board hereby authorizes the payment of expenses and fees in a sum not to exceed \$85,000 in the event a sale of approximately 8,500 acres of the Corporation's property is made to the Government at a gross price of \$1,700,000. Such payment of fees and expenses to be made upon the authorization of the President and Secretary of the Corporation with advice of Counsel. It is understood that the payment of these expenses and fees are contingent upon a sale and that they

(Testimony of Harry E. Benedict.)

are in addition to the authorized commission of five per cent.

I, John H. Robertson, Assistant Secretary of Palos Verdes Corporation, a Delaware Corporation, do hereby certify that the foregoing is a true copy of a resolution regularly adopted by the Board of Directors of said corporation at a meeting duly held on the 24th day of January, 1944, at which a quorum was present and voting throughout.

Witness my hand and the seal of said Corporation at Los Angeles, California, this 30th day of April, 1951.

[Seal] /s/ JOHN H. ROBERTSON,
Assistant Secretary.

Received in evidence May 1, 1951.

Q. (By Mr. Behnke): Subsequent to that time, at a meeting of the Board of Directors on the 31st day of July, 1944—I would like to have this marked as Plaintiff's Exhibit No. 5 for [24] identification——

Deputy Clerk Drew: Exhibit No. 5 for identification.

(Said document was marked as Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Behnke, continuing): I ask you to read those resolutions.

(Mr. Behnke hands papers to the witness.)

(Testimony of Harry E. Benedict.)

And is that a true and correct copy of the Resolutions which were passed by the Board of Directors at the meeting on the 31st day of July, 1944?

A. Yes, sir.

Q. Is that the signature of the Assistant Secretary and the seal of the Corporation (indicating on said document)?

A. Yes, sir.

Mr. Behnke: I would like to introduce this into evidence, your Honor.

The Court: It may be received.

(Said document, so offered and received in evidence, as aforesaid, was marked Plaintiff's Exhibit No. 5.)

PLAINTIFF'S EXHIBIT No. 5

Whereas, the Board of Directors of this corporation, Palos Verdes Corporation, organized under the laws of the State of Delaware, did heretofore pass a resolution authorizing the sale of all, or substantially all, of the property of this corporation located in Los Angeles County, California, and commonly known as Palos Verdes Rancho; and

Whereas, in pursuance of said resolution, the Vice-President of this corporation has been negotiating for the sale of all, or substantially all, of said property and has advised this Board of Directors that it is quite possible that said sale will be consummated; and

Whereas, the Certificate of Incorporation of this corporation, in Article VII thereof, provides that

(Testimony of Harry E. Benedict.)

this corporation may sell and convey all of its property when such sale is consented to by the vote of the holders of at least two-thirds in amount of the outstanding stock of the corporation at any regular or special meeting called for that purpose, or when consented to in writing by the holders of two-thirds in amount of said outstanding stock; and

Whereas, it is deemed advisable at this time to procure the consent of at least two-thirds of the holders of the issued and outstanding stock of this corporation authorizing this corporation to sell and convey all, or substantially all, of its property hereinabove referred to;

Now, Therefore, Be It Resolved, that the officers of this corporation be and they are hereby authorized and instructed to do such things and perform such acts as they may deem necessary for the purpose of obtaining the consent in writing by the holders of at least two-thirds in amount of the outstanding capital stock of this corporation to the sale of all, or substantially all, of said property of this corporation as hereinabove mentioned.

Be It Further Resolved, that such consent contain a copy of the foregoing power of this resolution and be further in the following form, to wit:

“The undersigned, being the owners of the amount of capital stock of Palos Verdes Corporation, a Delaware corporation, set opposite their respective names, do hereby approve the foregoing resolution and do hereby consent and

(Testimony of Harry E. Benedict.)

agree to the sale by said corporation of all, or substantially all, of its assets, including its real property located in Los Angeles County, California, and commonly known as Palos Verdes Rancho, said sale to be made upon such terms and conditions and for such price as the Board of Directors of said corporation may determine, provided, however, that this consent is given by each of the undersigned upon the express terms and conditions and with the understanding that in the event said sale is consummated all moneys, funds, and other property realized therefrom shall either (a) be distributed pro rata to the undersigned, respectively, or such thereof as desire the same to be distributed to them, according to the stock ownership in said corporation of the undersigned, respectively, or (b) that said Palos Verdes Corporation shall purchase from those of the undersigned who desire to sell the same all of their stock, at and for a price equal to the then book value of said shares of stock, respectively, and provided further that such distribution or purchase shall be made within a period of not more than ninety (90) days from and after the date of the sale of said property and the receipt by said corporation of the moneys, funds, or other property received by said corporation in connection with such sale.

“This consent may be executed in any num-

(Testimony of Harry E. Benedict.)

ber of counterparts, all of which shall be and constitute one and the same agreement.

“Stockholder	Number of Shares Owned
.....
.....
.....”

I, John H. Robertson, Assistant Secretary of Palos Verdes Corporation, a Delaware corporation, do hereby certify that the foregoing is a true copy of resolutions regularly adopted by the Board of Directors of said corporation at a meeting duly held on the 31st day of July, 1944, at which a quorum was present and voting throughout; that said resolutions have not nor have any of them been repealed or amended and that the same are and each of them is now in full force and effect.

Witness my hand and the seal of said Corporation at Los Angeles, California, this 26th day of April, 1951.

[Seal] /s/ JOHN H. ROBERTSON,
Assistant Secretary.

Received in evidence May 1, 1951.



Q. (By Mr. Behnke): Now, was Mr. Hanson, the General Manager, a licensed real estate broker, do you know? A. Yes, he was.

Q. And was he paid a commission by the Corporation in connection with such sales as he made?

(Testimony of Harry E. Benedict.)

A. Yes, sir. [25]

Q. Were his efforts to dispose of the whole Ranch to any governmental bodies successful?

A. No, sir.

Mr. Behnke: You may cross-examine.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Benedict, from the time of the incorporation of the Palos Verdes Corporation you have lived a substantial time in California, a substantial time in years? A. Yes.

Q. Now, you spoke of a sale in 1924 to a trust or a syndicate. Now, that sale was originally of the whole parcel on a conditional sale?

A. The promoter of the syndicate to buy, if I can use that term, had an option to buy all of the Ranch. I think that answers your question.

Q. And he only exercised the option as to the sections you have pointed out on the map?

A. He didn't raise as many funds as he had hoped to raise. Therefore, he compromised and purchased the property he could purchase.

Q. The property you previously pointed out on Plaintiff's Exhibit No. 1? A. Yes, sir. [26]

Q. At whose request was this map, Plaintiff's Exhibit No. 1, made?

A. It was made by that purchasing organization.

Q. I see. It was not made by the syndicate?

A. No, sir.

(Testimony of Harry E. Benedict.)

Q. The Palos Verdes syndicate?

A. No. It was actually made by Olmstead Brothers' organization, who were employed by the purchasing group.

Q. Now, you stated in the beginning a Mr. J. Lawyer was General Manager of the Palos Verdes Corporation. How long did he continue to be the Manager, approximately?

A. A close approximation would be possibly 1930.

Q. Then you changed managers in 1930?

A. If that is the year. It was approximately that.

Q. Approximately 1930? A. Yes.

Q. Then this Mr. Hanson became Manager?

A. No. Mr. Charles F. Schwedtman acted in that capacity for perhaps two years and Mr. Hanson was subordinate to him for that period.

Q. After this two-year period, then the managership reverted from Schwedtman and Hanson to Hanson? A. Yes.

Q. And did the Manager as such have an office in the Corporation? [27]

A. He had an office on the property.

Q. I mean was he an officer of the Corporation?

A. Yes. He was Vice-President.

Q. You fix about the subdividing of the section known as Rolling Hills at approximately 1936. Originally the sales in Rolling Hills were acreage sales, were they not? A. That is correct.

(Testimony of Harry E. Benedict.)

Q. And later a record of the survey was required? A. I believe that is true.

Q. To conform with County requirements for subdivisions? A. I believe that is so.

Q. Therefore, the individual purchasers had seen a record of the survey in the County Recorder's Office? A. I would assume so.

Q. From the years 1934-1935 up to approximately 1941 the Corporation more or less attempted to sell any property it could, in order to keep up with these taxes, did it not?

A. That is correct.

Q. And to effect that purpose put out certain what we might call leaflets, to pass out to the public, for the sale of this property?

May I have this marked for identification and put them all in one exhibit? [28]

The Witness: I would like to know what leaflets you are referring to.

Q. (By Mr. Mahoney): I will show you the leaflets. While we are waiting for the exhibits to be marked, Mr. Benedict, can you tell us how the sales or any sales in this whole tract, meaning the Rancho Palos Verdes, were handled? The Corporation didn't have a Broker's license, did it?

A. No. Mr. Hanson handled them as a real estate broker. He was a licensed Broker and received a commission on it for doing it.

Q. Weren't some of these sales handled through the Vanderlip Realty Company also?

(Testimony of Harry E. Benedict.)

A. No. Now I want to know just what period you are speaking of now?

Q. Well, generally from the period from approximately 1934 up to 1944?

A. No. There was no Vanderlip Realty Company then.

Q. There was another independent broker named I. W. Moore? A. That is correct.

Q. He also handled sales for this Corporation?

A. That is correct.

Q. During this period?

A. That is correct. [29]

Q. And commissions were paid to whomever made the sales? A. That is correct.

Deputy Clerk Drew: Defendant's Exhibits A, A-1, A-2, A-3 and A-4 for identification.

(The documents produced by Mr. Mahoney were marked as Defendant's Exhibits A, A-1, A-2, A-3 and A-4, for identification.)

Mr. Mahoney: Thank you.

Q. Mr. Benedict, I show you Defendant's Exhibit A-1 and ask you if that was a type of advertising passed out by the Corporation or its brokers for the sale of the Rolling Hills subdivision?

A. That is correct, it is Rolling Hills'.

Mr. Mahoney: I am sorry, counsel.

Mr. Behnke: I haven't seen the exhibit.

A. That is the Rolling Hills leaflet (indicating document).

(Testimony of Harry E. Benedict.)

Q. (By Mr. Mahoney): Exhibit A-1 relates to Rolling Hills, Mr. Benedict?

A. That is correct—that is Exhibit A.

Deputy Clerk Drew: There is Exhibit A and then A-1.

Q. (By Mr. Mahoney): Mr. Benedict, I show you Defendant's Exhibit A-1 and ask you if that was a type of advertising used during the development of Rolling Hills? A. Yes, sir. [30]

Q. I also ask you if you can tell the approximate date in which that was used, the approximate year?

A. I would guess around 1940.

Q. Around 1940, and there is a small map on the back showing the situation of Rolling Hills, on the back of the exhibit? A. Yes, sir.

Q. Showing where Rolling Hills is situated?

A. Yes, sir.

Q. I show you Defendant's Exhibit A-2 and ask you approximately in what year that exhibit was used for the sales of property in Rancho Palos Verdes?

A. I would make a guess, about 1937.

Q. In 1937. And that exhibit is not confined exclusively to Rolling Hills; it is confined to just the Rancho Palos Verdes, is it not?

Mr. Behnke: May I object to that question and have it stricken? The document I think will speak for itself.

The Court: Overruled.

The Witness: Will you repeat the question?

Mr. Mahoney: Will you read the question?

(Testimony of Harry E. Benedict.)

(Pending question read by the reporter.)

A. I would say that it was general in its nature and it could apply both to the Ranch and to Rolling Hills, but it applies to both in its text. [31]

Q. Thank you. I show you Defendant's Exhibit A-4 and ask you approximately what year the folder was used for the purpose of informing the public as to the Rancho Palos Verdes?

A. I believe this was 1945 or later, that particular folder.

Q. Thank you. I show you Defendant's Exhibit No. A-3 and ask you in what year that folder was used for explaining the Rancho Palos Verdes to the public?

A. This could not have been earlier than 1944 and I should think it was about 1945.

Mr. Mahoney: Thank you.

At this time, the Defendant would like to offer Exhibits A, A-1, A-2, A-3 and A-4 into evidence.

The Court: They may be received.

(Said documents, so offered and received in evidence, as aforesaid, were marked as Defendant's Exhibits A, A-1, A-2, A-3 and A-4.)

Mr. Mahoney: Thank you.

Q. At one time, in approximately 1936 or 1937, there were signs posted on the property offering one to a thousand acres for sale?

A. I don't remember a wording just like that. It might have been, but I do not remember it.

(Testimony of Harry E. Benedict.)

Q. You don't recall if there were such signs posted? [32] A. No.

Q. Now, you mentioned that quite a bit of this property was under cultivation for certain types of crops. The Rolling Hills subdivision was under cultivation before it was subdivided, was it not?

A. Some portions of it, but due to the topography, it was limited in its farming usefulness.

Q. Now there is a map in existence entitled a crop map, is there not?

A. I am certain there is.

Mr. Mahoney: May I have this marked as an exhibit?

Deputy Clerk Drew: Defendant's Exhibit B for identification.

(Map marked as Defendant's Exhibit B, for identification.)

Q. (By Mr. Mahoney): Mr. Benedict, I call your attention to Defendant's Exhibit B, for identification, and ask you if this is the map that is commonly known as crop map of the Palos Verdes Corporation? A. Yes; I believe it is.

Q. And this map indicates the areas under cultivation as of the date of its marking?

A. I don't know how current it is, but it is a crop map.

Q. Would you point out and exhibit to the Court which [33] areas were not under cultivation at the time of this map?

A. Well, I do not believe that I could do that

(Testimony of Harry E. Benedict.)

very accurately, without considerable study of the map and the legends here, because you understand that farming areas are interspersed among arroyos and hillsides and steep knolls, and I should say that the map would have to speak for itself on that, because we have cultivated areas with considerable areas that are not cultivated.

Q. Can you point out to us the area of Rolling Hills on that map?

A. It is approximately this area in here (the witness indicates on said map).

Q. Would you care to mark it with an R.H., so we can have it located? Do you have a red pencil?

Deputy Clerk Drew: Here are green and red pencils.

Q. (By Mr. Mahoney): With this red pencil could you trace its outline on the map, please, or as closely as you can recall?

(The witness complies with counsel's request and places marking on said Exhibit B.)

Q. And would you mark the interior of that with an R.H., the area you have marked off in red penciling?

The Witness: R.H. meaning what?

Mr. Mahoney: Meaning Rolling Hills.

(The witness places "R.H." on said [34] map.)

Mr. Mahoney: Thank you.

Q. Now, on the same map can you point out to

(Testimony of Harry E. Benedict.)

us the parcel of property that was sold in 1944 to Mrs. Snow?

A. It is this area right in here (indicating on map), but I would have to have it delineated on the map to——

Mr. Behnke: Counsel, I was going to introduce this into evidence, showing the Snow parcel delineated. I had Mr. Wilson, the engineer, make this delineation and I will stipulate that the portion sold to Audrey Snow in 1944 was this area that is circled in blue and in yellow.

Mr. Mahoney: Thank you.

Mr. Behnke: The blue areas I believe are the tillable areas in the Snow parcel and the yellow areas are the canyons and barrancas and the non-tillable areas in the Snow parcel which was sold.

Mr. Mahoney: Thank you, Mr. Behnke.

Q. The parcel that was sold to Mrs. Snow was under cultivation at the time it was sold, was it not?

A. Those parts that were normally cultivated, I assume, were under cultivation at the time of sale.

Q. They were under cultivation at the time of sale, those parts that could be cultivated?

A. I should think so.

Q. The sale took place in July and that was in the [35] middle of the farming season. What arrangements were made with the farmer when the sale took place?

A. I don't know, but I would assume that he concluded the farming, his crop contract.

Q. Going back to the year approximately 1939,

(Testimony of Harry E. Benedict.)

or 1940, it was in one of these years that approximately 2,500 or 3,500 post cards were mailed out to various people in Los Angeles County, offering for sale any number of acres for \$185.00 an acre?

The Witness: Are you asking me if they were sent out?

Mr. Mahoney: That is correct.

A. I believe that is true. If I saw one, I could identify it, but I believe that cards were sent out.

Q. Naming a specific price per acre?

A. Yes.

The Court: What was the answer to that last question?

The Reporter: Answer "Yes."

Q. (By Mr. Mahoney): Now, Mr. Benedict, in 1944, besides the sale to Mrs. Snow, there were also sales of property termed as acreage in approximately 531 acres. Are you able to point out on the map approximately where this other acreage was located?

A. I don't believe I am competent to do that. There were two or three parcels involved—three or four parcels involved. [36]

Q. Mr. Benedict, each year from about 1935 on up until approximately 1943 there was a document entitled Report of General Manager made by the General Manager of the Palos Verdes Corporation, was there not? A. Yes, sir.

Q. And that report was for the benefit of the stockholders? A. Yes, sir.

Q. And the Directors of the Corporation?

(Testimony of Harry E. Benedict.)

A. Yes, sir.

Q. And it told what had been done to raise money during the period of time and what the intention—the current policy of the Corporation was?

A. Yes, sir. Well, it was a report of the Manager to its Board and to the stockholders.

(Documents marked by the Deputy Clerk as Defendant's Exhibits C, D, E, F, G, H, I and J, for identification.)

Deputy Clerk Drew: Defendant's Exhibits C, D, E, F, G, H, I and J marked for identification.

Q. (By Mr. Mahoney): I have in my hands, Mr. Benedict, Defendant's Exhibit C for identification, which is entitled the General Manager's Report, Palos Verdes Corporation, September 30, 1935. Turning to the last page of that report and the last paragraph thereof, I ask you if the report does not indicate that the Corporation [37] through its General Manager was in the process of publicizing its holdings at that particular time?

Mr. Behnke: May I look at that, counsel?

Mr. Mahoney: I am sorry, counsel.

A. The answer is, obviously, yes, we wanted to sell it.

The Court: Just a moment, Mr. Benedict, until your counsel sees that.

Mr. Mahoney: May we have the answer to the question?

A. Yes, we wanted to sell the property and we

(Testimony of Harry E. Benedict.)

did want any favorable publicity we could have on it.

Q. Mr. Benedict, I hand you Defendant's Exhibit D, which is a General Manager's Report of the Palos Verdes Corporation, dated September 30, 1936. Would you care to see that before I question him on it, counsel?

Mr. Behnke: Yes.

(Said document was handed to Mr. Behnke.)

Mr. Mahoney: I might explain for the record that these Reports of the General Manager are here through a subpoena issued by Defendant.

Q. Calling your attention to page 11 of that Exhibit D, in which the Report relates to the sale of decomposed granite, I ask you if the report does not state that the sale was being made in such a way that it would not [38] interfere with the later subdivision of the properties? A. Yes.

Q. Thank you. I hand you Exhibit E, the Executive Vice-President's Report, Palos Verdes Corporation, for the year ending September 30, 1937, and ask you to turn to page 1 of that Report and ask you if in that report it does not state that the salvation of the Corporation is to go from farming to residential property? A. It so states.

Q. I hand you Exhibit F, the Palos Verdes Corporation Executive Vice-President's Report for the year ended September 30, 1938, and ask you to examine it.

(The witness examines said document.)

(Testimony of Harry E. Benedict.)

I ask you to turn to page 4 of that exhibit and ask you if again the statement in the Report is that the only salvation of the Corporation is that they go from farming to sales of their real property?

A. It isn't stated exactly as you put it, but substantially so.

Mr. Mahoney: If you care to have me rephrase my statement, I will.

Mr. Behnke: May he read the statement?

Mr. Mahoney: He may read it.

A. "The future of the Palos Verdes Corporation is dependent on the successful development and sales of its [39] land."

Q. Thank you. Now, I show you Exhibit G, Executive Vice-President's Report of the Palos Verdes Corporation for the fiscal year ending September 30, 1939. Calling your attention to page 5 and page 6 of that report, I ask you if that report does not indicate that the Corporation was in the process or had made a sale to the Navy for a housing project and was attempting to sell property adjacent thereto for the same purposes?

A. We were trying to sell property to anyone who would buy it, and that is what this report does say.

Q. And again, that the only salvation of the Corporation is in the sales of its real property?

A. That is right.

Q. Thank you. I now hand to you Exhibit H, which is Executive Vice-President's Report for the fiscal year ending September 30, 1940.

(Testimony of Harry E. Benedict.)

A. (The witness examines said document): Yes, sir.

Q. Calling your attention to page 4 of Exhibit H, I ask you if the report does not state that an attempt is being made to dispose of real estate in order to pay off the delinquent County taxes?

A. It does state that.

Q. Calling your attention to page 8 of that report, I ask you if it does not state that the farming is becoming [40] unprofitable and that real estate is the only thing that the Corporation had that profitably could be sold?

A. Yes, because if you would care to read that question——

Mr. Mahoney: If you would care to read the paragraph in this report, the top paragraph on page 8, if you feel I am misleading you——

The Witness: No.

The Court: As far as reading what is in it, that is a matter for the Court. He is interpreting what is in it. That is a matter for the Court. If you have in mind just having him state it, although I suppose counsel hasn't either, it would be more expeditious to save time, but I think probably to get away from just the vice that you are running into now, you could refer to the report, with particular reference to a portion thereof, read it yourself and just ask the witness if that was not a report that was issued on that date, at that time. Then you are accomplishing your purpose in bringing that specific portion to the attention of the

(Testimony of Harry E. Benedict.)

Court and at the same time you are not asking him to interpret it.

Mr. Mahoney: That is correct. I have been trying to stay away from that, your Honor. I am sorry.

Q. Calling your attention to page 9 of Exhibit H, that is a report issued at the time that there was an attempt [41] to sell certain acreage at \$300.00 an acre? A. Yes.

Q. Calling your attention again to pages 10 and 11 of Exhibit H, I ask you if this report can fix the date in which these cards were mailed out advertising the acreage at approximately \$185.00 an acre?

A. Yes. I believe it does enable one to fix that very approximately.

Q. That was in what year?

A. It would probably have been in the year 1940.

Q. I hand you Defendant's Exhibit I, which is Report of the General Manager for the year ending September 30, 1941, and call your attention to pages 8 and 9 thereof, and ask you if that was a year in which an attempt was made to sell certain acreage to a syndicate for subdivision purposes near the Naval housing project?

A. Yes, we were trying to sell a substantial parcel to a syndicate.

Mr. Mahoney: Thank you. I would like to offer into evidence Defendant's Exhibits D, E, F, G, H, I and C.

(Testimony of Harry E. Benedict.)

The Court: They may be received.

(Said documents, so offered and received in evidence as aforesaid, were marked by the Deputy Clerk as Defendant's Exhibits C, D, E, F, G, H and I, in evidence.) [42]

DEFENDANT'S EXHIBIT C

Palos Verdes Corporation

General Manager's Report

September 30, 1935

General

Due to the change of the fiscal year of the Palos Verdes Corporation from December 31 to September 30, the following report is for the period of nine months only.

There has been some slight pickup in the real estate market.

The prices received for fresh vegetables were considerably less than the previous year, as well as the prices received for hay and beans.

Real Estate

* * *

Vegetable Lands

Coast Vegetable Lands:

Revenues received from coast vegetable lands from 1927 to 1935, inclusive:

(Testimony of Harry E. Benedict.)

1927.....	\$15,617.50
1928.....	15,600.00
1929.....	8,949.95
1930.....	15,840.00
1931.....	9,110.00
1932.....	23,840.00
1933.....	26,776.45
1934.....	28,594.29
1935.....	31,126.50

1682 acres of Coast Vegetable Lands were leased to June Sakai at \$18.50 an acre, for \$31,126.50. Due to the very low prices received from the produce of these lands, Sakai was unable to pay the last \$3,000 due on the lease. This is expected to be collected by April 1, 1936.

Inland Vegetable Lands:

A total of 728 acres of inland lands were leased on a crop share or cash rent basis.

Crop Share Leases

	Acres	Total Cash Rec'd	Cash Rec'd per Acre
1933.....	42	\$1,171.45	\$27.70
1934.....	364	5,798.86	15.95
1935.....	473	5,458.17	11.54

Cash Leases:

1934.....	38 Acres @ \$ 7.50 =	\$ 285.00	
	100 Acres @ 9.00 =	900.00	\$1,185.00
1935.....	210 Acres @ 7.50 =	1,575.00	
	45 Acres @ 10.00 =	450.00	2,025.00

Inland vegetable lands, prior to the 1932-33 crop, were in barley hay. The rent received was anywhere from 34c an acre to \$8.00 an acre. While we

(Testimony of Harry E. Benedict.)

have constantly increased the amount of acreage taken from barley hay and put into vegetables, the amount of return per acre for rent has decreased each year, due to the fact that vegetables are coming on the market at the same time as ours, from lands not heretofore in vegetable production; that the last two seasons have been mild all over Southern California, and the lands that mature their crops later than ours have matured them at the same time as ours; and also that the purchasing power of the public has decreased.

Field Crops

During the crop year 1935, 3021 acres were planted to field crops—barley, barley hay, lima beans—which brought in a gross revenue of \$22,308.00

Number of Acres Planted and Our Share

	Acres	Cash Value	Per Acre
1932.....	3855	\$17,251.21	\$4.48
1933.....	3855	22,457.07	5.83
1934.....	3020	18,431.00	6.10
1935.....	3021	22,308.16	7.35

The average production was:

1934.....	2833 Acres in hay, producing 5798 tons, average 2.04 tons per acre.
1935.....	1521 Acres in hay, producing 5156 tons, average 3.39 tons per acre.
1934.....	306 Acres in beans, producing 1211 sacks, average 3.9 sacks per acre.
1935.....	200 Acres in beans, producing 1288 sacks, average 6.4 sacks per acre.
1935.....	1300 Acres in grain, producing 34828 sacks, average 27.0 sacks per acre.

(Testimony of Harry E. Benedict.)

Natural Resources

Dicalite Company:

The Dicalite Company has a lease on 259 acres. This lease expires March 31, 1945. The lease is on a royalty basis of 65c per ton. For the first nine months of 1935, the royalties amounted to \$11,-138.97. For the corresponding period in 1934, \$13,-106.68.

Rotary Mud:

Due to the vast curtailment in oil well drilling, until late summer of 1935, there was very little oil well drilling. There was so little mud business, that we believed it more satisfactory if arrangements could be made to allow a trucking company or a concern already engaged in supplying materials to the oil industry, to handle the Rotary Mud business, as they could do it more profitably than the Palos Verdes Corporation. For this reason, a lease was made by the Owl Truck & Materials Co. for the sale of this mud on a royalty basis of 20% of the prevailing price at the mud pit. The revenue received from the sale of mud for the

First nine months of 1934.....	\$1750.00
First nine months of 1935.....	1516.18

Flagstone:

No flagstone was offered for sale during the year 1935, due to the desire to conserve this stone for

(Testimony of Harry E. Benedict.)

tion lies in the development of its land for fine residential purposes. It is so varied scenically and climatically, as well as in contour, that it is adapted for the cheapest as well as the most expensive houses.

At the present time, we are developing a portion of our property of approximately 600 acres under the name of "Rolling Hills," to supply homes to those making between \$500 and \$1000 a month who can afford to pay between \$12,000 and \$20,000 for a house and lot.

Farming

The total acreage under cultivation in 1936.....	5118 Acres
The total acreage under cultivation in 1937.....	4900 Acres
— a deduction of.....	218 Acres

This acreage was taken out of cultivation as it was impossible to farm it profitably.

Coast Vegetable Lands:

Revenues received from coast vegetable lands:

1936.....	\$29,128.25
1937.....	\$26,737.50

Coast acreage leased for vegetables:

1936	1574½ Acres
1937	1575 Acres

A cash rental of \$18.50 an acre was received. However, the Palos Verdes Corporation agreed for

(Testimony of Harry E. Benedict.)

the farm-year 1937 to refund to the Japanese, to cover their general office expense, \$1.52 per acre. In prior years, the Japanese have paid this amount themselves, but due to the very poor returns for the crop year 1936, it was impossible for them to carry on unless some adjustment was made by the Corporation.

Inland Vegetable Lands:

	Acres	Revenue	Average per Acre
1936.....	843.6	\$ 7,948.71	\$ 9.42
1937.....	942.78	10,608.66	11.24

Field Crops

During the crop year 1937, 2382.2 acres were planted to field crops—barley, barley hay and beans—which brought in a gross revenue of \$15,874.36 or \$6.66 an acre, against 2700 acres in 1936 with a total revenue of \$12,955.87 or \$4.80 an acre. This is an increase of \$1.80 an acre.

Summary of Farm Lands

Total Farm Revenue—1936.....	\$50,032.83
Total Farm Revenue—1937.....	53,220.52

Natural Resources

Dicalite Company:

There is no change in the Dicalite lease, which runs until March 31, 1945, at a royalty of 65c per ton.

(Testimony of Harry E. Benedict.)

1936—royalties	.....\$16,329.62
1937—royalties	..... 16,113.24

Rotary Mud:

In December, 1936, a five-year lease was signed with Mojave Corporation for the operation of the rotary mud deposit on the lands of the Palos Verdes Corporation. This lease called for a minimum royalty of \$6,000 for the year 1937.

1936—royalties	.....\$2,887.11
1937—royalties	..... 6,338.00

Decomposed Granite:

Graham Bros, continued to operate our decomposed granite deposits and paid us a revenue during 1937 of \$3,678.71, as against \$1,266.27 for 1936.

Road Dirt:

During the Wilmington-Long Beach oil field boom in 1937, a great deal of common dirt was used for sub-bases to the roads across the sand flats. Our Ranch supplied much of this dirt through the operations of two trucking contractors, who paid us a royalty of 5c per yard, or a total of \$21,310.56. This is probably a non-re-occurring item.

Rock:

Some rock and flagstone was sold during 1937—the majority of it to the residents of Rolling Hills.

1936	.....\$ 561.11
1937	..... 2,034.95

Received in evidence May 1, 1951.

(Testimony of Harry E. Benedict.)

DEFENDANT'S EXHIBIT F

Palos Verdes Corporation

Executive Vice-President's Report
Fiscal Year Ending September 30, 1938

Farming

As repeatedly stressed in my past reports, our revenue from farming has been declining every year, and will continue to decline at an increased rate due to labor costs (over which we have no control), and to the wearing out of our soil. The decrease this year was \$9700.

* * *

Real Estate

The future of the Palos Verdes Corporation is dependent on the successful development and sales of its land. In the past year, \$122,529.49 worth of land was sold. The book value of this land, plus sales and all development costs, amounted to \$77,951.16, giving a gross profit of \$44,578.33. Every effort will be made to increase sales during the coming year.

* * *

Received in evidence May 1, 1951.

(Testimony of Harry E. Benedict.)

DEFENDANT'S EXHIBIT G

Palos Verdes Corporation

Executive Vice-President's Report

Fiscal Year Ending September 30, 1939

* * *

The United States Government has spent \$150,000 on plans and surveys for the Navy Housing at "Harbor Hills," and are expecting to break ground on a million and a half dollar project before January 10, 1940. Under the terms of the gift deed from the Corporation to the United States Housing Authority, no business may be operated on the land given to the Government. This gives the Palos Verdes Corporation the monopoly on all the business property in "Harbor Hills," and should be the source of a continuous profitable income, either from building the stores and leasing them or ground leasing the business property.

We have made plans at "Harbor Hills" for the development of a community of small two-bedroom homes just east of the Government Project, these homes to be either built and sold by the Palos Verdes Corporation, or the Corporation might put in the streets and improvements and get some operative builders to build the houses. We expect to have definite plans on "Harbor Hills" worked out by January 1.

As repeatedly stressed in these annual reports, the management believes that the future of the Corporation lies in successfully disposing of the

(Testimony of Harry E. Benedict.)

real estate, either in large blocks or in small home sites or to speculators, and in being ready to take advantage of the real estate cycles, disposing of as much property as it can during the periods of prosperity, as it is not possible to work the land profitably from a farming standpoint.

* * *

Received in evidence May 1, 1951.

DEFENDANT'S EXHIBIT H

Palos Verdes Corporation

Executive Vice-President's Report
Fiscal Year Ending September 30, 1940

Rolling Hills, California,
October 15, 1940.

As in the past, the Palos Verdes Corporation's income this year was derived from farming, natural resources and sale of real estate. The Corporation's loss for the fiscal year ending September 30, 1940, was \$73,217.92 as against \$80,501.05 in 1939. However, in the \$73,217.92 loss is included an expense item of \$21,583.71 which represents the book value of the land which was given to the Los Angeles County Housing Authority. Without this item the loss is \$51,634.21.

* * *

The Corporation is now delinquent in its taxes since 1935-36. During the last summer a great deal

(Testimony of Harry E. Benedict.)

of work was done with the County Board of Supervisors to see if they would not buy from us 1800 acres of land for \$374,000, this money to be used to pay the County \$374,000 of current and delinquent taxes. Because three of them were running for reelection, this sale could not be completed. If these taxes are not paid by July 1, 1941, the State of California will obtain title to the property. We are planning to bring suit against the County of Los Angeles on the ground that our taxes are illegal, and believe there is a possibility of working out a compromise with the County as to the face of the tax bills and that it will not be necessary for us to pay interest or penalties. We believe that with the national election out of the way, real estate will pick up and that we will be able to dispose of enough property to meet the adjusted tax bills, as well as to have some working capital.

The Portuguese Bend Road was completed, surfaced and in use by the summer of 1940.

Farming

Our farming revenue for the year 1940 is practically the same as it was in 1939 and 1938. As shown by the following, there was a decrease in the amount of acreage in vegetables, but there was a slight increase in the amount of hay, grain and bean land, and we were able to get an average higher rent for the vegetable lands in 1940 than in 1939. Due to war conditions the price of barley grain was

(Testimony of Harry E. Benedict.)

less this year than last year, and this brought the average return for the hay and grain lands to \$4.90 per acre from \$5.10. We see no way of increasing the farm revenue over what it has been the past three years.

Vegetable Lands:

	No. Acres	Gross Revenue	Average per Acre
1936.....	2418.1	\$37,076.96	\$15.33
1937.....	2517.78	37,346.16	14.83
1938.....	2205.02	34,252.91	15.50
1939.....	2113.85	33,063.43	15.64
1940.....	1970.35	32,305.63	16.39

Hay and Grain Lands:

	No. Acres	Gross Revenue	Average per Acre
1936.....	2700.0	\$12,955.87	\$4.80
1937.....	2382.2	15,874.36	6.66
1938.....	2769.8	12,166.16	4.39
1939.....	2751.4	14,179.40	5.10
1940.....	2882.6	14,153.79	4.90

Total Farm Revenue—1936.....	\$50,032.83
1937.....	53,220.52
1938.....	46,419.07
1939.....	47,242.83
1940.....	46,459.42

Natural Resources

Our revenue from natural resources is about the same as last year, as shown by the following tables:

(Testimony of Harry E. Benedict.)

Diatomaceous Earth:

1936 — royalties.....	\$16,329.62
1937 — royalties.....	16,113.24
1938 — royalties.....	12,850.77
1939 — royalties.....	14,752.59
1940 — royalties.....	18,029.45

Rotary Mud:

1936 — royalties.....	\$ 2,887.11
1937 — royalties.....	6,338.00
1938 — royalties.....	5,000.00
1939 — royalties.....	4,000.00
1940 — royalties.....	4,213.86

Decomposed Granite:

1936 — royalties.....	\$ 1,266.37
1937 — royalties.....	3,678.71
1938 — royalties.....	1,967.84
1939 — royalties.....	3,189.08
1940 — royalties.....	5,268.33

Road Dirt:

1937 — royalties.....	\$21,310.56
1938 — royalties.....	6,893.10
1939 — royalties.....	1,508.63
1940 — royalties.....	426.20

Flagstone:

1936 — royalties.....	\$ 561.11
1937 — royalties.....	2,034.95
1938 — royalties.....	1,161.11
1939 — royalties.....	707.84
1940 — royalties.....	180.48

(Testimony of Harry E. Benedict.)

Total Income Natural Resources

1936	\$21,044.11
1937	49,475.46
1938	27,872.82
1939	24,158.24
1940	28,118.32

* * *

Real Estate

The average revenue from farming operations for the past five years has been \$48,674 and taxes have averaged \$67,024 per year. The corporation is going to be dependent in its survival upon its development of real estate and natural resources. Our natural resources cannot be counted on as a staple income because they are being constantly depleted. Therefore, real estate is our all important merchandise. The only real estate that we have is for residential purposes as the trend at this time is for real estate for use and not for speculation. Broadly speaking, there are two residential uses for our property. One is for year around homes and the other is for week-end places and hobby ranches. The latter are luxuries.

* * *

We have tried for months to sell this land for \$300 an acre to speculative builders.

* * *

(Testimony of Harry E. Benedict.)

There is a great urge on the part of people of means to acquire a piece of land that would give them a living and an income if conditions should become worse than they are today. Therefore, wealthy people buying acreage are looking for going profitable farms or orchards. The cost of water on our land is so high as to make commercial farming requiring water impractical. Dry farming and cattle raising pay only when you have a large block of acreage at a low capital cost. Such land is selling between \$10 and \$50 per acre. It would be ridiculous for us to offer our property at that price. We are endeavoring to sell some 50- and 100-acre blocks to wealthy people to be used as summertime and week-end homes. We recently mailed out 10,000 circulars offering some acreage at \$185 per acre. We got twenty-five return postal cards, but have not made any sales.

* * *

Received in evidence May 1, 1951.

(Testimony of Harry E. Benedict.)

DEFENDANT'S EXHIBIT I

Palos Verdes Corporation

Executive Vice-President's Report

Fiscal Year Ending September 30, 1941

Real Estate

Sales of land during the current year amounted to \$122,446.43, an increase of \$100,175.42 over the previous year. The actual cost of this land, including all improvement charges, amounted to \$72,-894.89, leaving a profit (before deducting appreciation of \$84,267.53) of \$49,551.54, or a loss of \$34,-715.99 if the \$84,267.53 is considered.

Ten houses were built in Rolling Hills during the current year, at an approximate cost of \$100,000.

An attempt was made to sell the U. S. Navy a hospital site of one hundred thirty-five acres. After a great deal of strenuous work on the part of the writer, the site and the price were approved by Rear Admiral Ross T. McIntire, Surgeon General of the U. S. Navy, and the Navy Shore Stations Development Board. When this information was published in the Long Beach papers, Long Beach brought so much political pressure to bear upon Congress that the Surgeon General's selection was overruled and a site for the hospital was acquired in Long Beach by condemnation proceedings.

The Los Angeles County Housing Authority Harbor Hills Project is now completed and partially occupied.

(Testimony of Harry E. Benedict.)

Negotiations are under way for the sale of 120 acres just east of the Harbor Hills Housing Project to a syndicate who are planning to build and sell 480 houses, the houses to be built 100 at a time and the 480 to be built just as fast as they can be sold on the market.

.....,
A. E. Hanson
Executive Vice-President.

Received in evidence May 1, 1951.

The Court: We will recess until 1:30.

(And thereupon a recess was taken until 1:30 p.m. of the same day, Tuesday, May 1, [43] 1951.)

Thursday, May 1, 1951

Mr. Mahoney: Your Honor, I wish to apologize for being late. I misunderstood the time court would reconvene and understood it to be 2:00 o'clock instead of 1:30.

The Court: Very well. You may proceed.

Mr. Mahoney: Thank you. Will you mark this, please?

(Map marked as Defendant's Exhibit K, for identification.)

Deputy Clerk Drew: Defendant's Exhibit K, for identification.

HARRY E. BENEDICT

resumed the witness stand as a witness on behalf of the Plaintiff, having been previously duly sworn, and testified further as follows:

Cross-Examination

(Continued)

By Mr. Mahoney:

Q. Mr. Benedict, I hand to you Defendant's Exhibit K, a Gibbs map of Rancho Palos Verdes, and ask you if that is a map of the entire Rancho Palos Verdes?

A. Well, substantially so. There is a little of the Panhandle that isn't shown, but it is substantially that whole area.

Q. What is the approximate date that that map was drawn?

A. The actual date stated is March 25th, [44] 1941.

Q. Do you know if that map was used in connection with the sales of real property of the Rancho Palos Verdes?

A. I have no knowledge that it ever was.

Mr. Mahoney: I would like to introduce Exhibit K into evidence.

The Court: It will be received.

(Said map, so offered and received in evidence, was marked as Defendant's Exhibit K.)

Mr. Mahoney: Next, for identification, the map of Palos Verdes Park.

(Testimony of Harry E. Benedict.)

(Map marked as Defendant's Exhibit L, for identification.)

Deputy Clerk Drew: Defendant's Exhibit L, for identification.

Q. (By Mr. Mahoney): Mr. Benedict, I hand to you Defendant's Exhibit L, which purports to be a map of Palos Verdes Park. Here is the top of it. Is that the plat or the map which was used in conjunction with the proposed sale to the County or to the Federal Government for use as park purposes?

A. It might have been one of them. I don't know that it was the map. It perhaps was used.

Q. There were several maps such as that used for the sale purposes? A. I imagine so.

Q. And that is one of those maps? [45]

A. I should think so.

Mr. Mahoney: I offer Defendant's Exhibit L into evidence.

The Court: It may be received.

(Said map, so offered and received in evidence, as aforesaid, was marked by Deputy Clerk Drew as Defendant's Exhibit L in evidence.)

Q. (By Mr. Mahoney): Mr. Benedict, are you at all familiar with the contracts made with the various farmers for the land that was rented out for farming purposes?

A. I would have no detailed knowledge of that.

(Testimony of Harry E. Benedict.)

Mr. Mahoney: You have no detailed knowledge of it.

No further questions.

Redirect Examination

By Mr. Behnke:

Q. Mr. Benedict, referring to Defendant's Exhibits C, D, E, F, G, H and I, reports of the General Manager which were introduced into evidence by the Defendant, these reports were in the nature of a general report, were they not, of all of the activities of your Corporation during the particular years involved? A. Yes, sir.

Q. In other words, they discussed the real estate, the real estate activities of the Corporation, the farming and the revenues derived from the farming [46] activities of the Corporation, and they also referred to certain other financial matters relating to the Corporation and the profit and loss in certain instances. Now, where the Manager speaks of the future of the Corporation, were those in the nature of recommendations to the Corporation?

A. No. This was a report of a man on his stewardship as Manager. Matters that came up for definitive action on the part of the Board were made at Board meetings on direct recommendation of the Manager.

This was an annual report made for the benefit of the stockholders.

(Testimony of Harry E. Benedict.)

Q. Then, the statements embodied in these reports do not necessarily reflect the policy of the Corporation as such?

A. No, sir. They were the Manager's comments on matters to consider.

Q. Now, counsel has called your attention, in connection with Exhibit G (pages 5 and 6) to the efforts of the Corporation to dispose of its real estate and the Report reads:

"As repeatedly stressed in these annual reports, the management believes that the future of the Corporation lies in successfully disposing of the real estate, either in large blocks or in small home sites or to speculators, [47] and being ready to take advantage of the real estate cycles, disposing of as much property as it can during the periods of prosperity, as it is not possible to work the land profitably from a farming standpoint."

It is true, is it not, that the Corporation during the year of this Report was making efforts to dispose of all or portions of its property?

A. Yes. We had a large tax accumulation that was worrying us.

Q. However, the Corporation, during this year or during any other years except with respect to the Rolling Hills project, did not develop it in a business sense, a real estate business sense, did it?

A. No, sir.

Q. In other words, no other portions of the Ranch were platted out and roads put in and improvements made in connection therewith?

(Testimony of Harry E. Benedict.)

A. No, sir.

Q. So that the sales that were made in your efforts during these years were of the lands in their condition that they substantially were at the time of acquisition?

A. That is correct.

Q. Would that be correct?

A. That is correct.

Q. Now, many of these sales that were made, Mr. Benedict, [48] were made to people who in turn developed, subdivided and sold those properties, were they not?

A. Yes, sir.

Q. Now referring to these cards that were sent out by Mr. Hanson, they are contained in the Exhibit H report for the year 1940, in which he states, on page 11, "We recently mailed out 10,000 circulars offering some acreage at \$185.00 per acre." Could you tell the Court to what that acreage referred?

A. At least to a considerable extent it referred to an acre across Palos Verdes Drive North and toward—Is that Narbonne Avenue that comes in by the reservoir?

Q. Could you designate the portions referred to?

A. Yes, I could designate it. It particularly had to do with this area in here (witness indicates on map), which Mr. Hanson held in rather low esteem. It was not arable land in the main. It was rough. He felt the view wasn't very good and that if he could divest the Corporation of a few hundred acres in there, for something, it would be to our advantage, and he doubted its future value. And

(Testimony of Harry E. Benedict.)

that was one of the primary reasons that he sent his cards out. Now, if he had inquiries, I suppose it would have affected any other property that he could have sold advantageously, but that was the thing that he particularly had in mind. [49]

Q. This land on the rearage of the area——

A. Yes.

Q. And land which is indicated on the Corporation's crop section map here as being tillable was barren and non-income producing, is that correct (indicating on map)?

A. I should think that was substantially correct. I doubt if we farmed very much of that area. There might have been some barley—— ..

Q. And was any of this (indicating on map) area platted out or improved in any way?

A. Not at that time.

Q. Now referring to Exhibit K introduced by the Defendant, that is, the Gibbs map, did the Corporation itself adopt this map as a plan of operation and development of the Ranch?

A. No. I have no memory of their ever having given any serious consideration to the map. They certainly never adopted it in any sense in its method of operation.

Q. Now referring to Defendant's Exhibit L, which was a Palos Verdes park project; this land which is plotted as a park, was that substantially all of the holdings of the Palos Verdes Corporation at that time?

A. As I look at the map, it would seem to be

(Testimony of Harry E. Benedict.)

substantially all of it.

Q. There is, of course, excluded from this the Rolling [50] Hills?

A. Excluding the Rolling Hills, the Filiorum, the United States Government——

Q. Lands not owned by the Corporation?

A. ——lands not owned by the Corporation.

Q. And it is substantially all of the contiguous area that was owned by the Corporation at that time?

A. I would say all of it so far as I can see from that map.

Q. And the Corporation did make efforts to dispose of this in its entirety to the County of Los Angeles?

A. Oh, they made extensive efforts, they made substantial expenditures in the costs of presenting it over the period of months, for a year or two, made every effort to consummate such a transfer.

Q. Did the Corporation make any improvements or install any kind of development here (indicating on map) for the purpose of endeavoring to sell at this time——

A. No; I think not.

Q. ——to the County? A. No, sir.

Q. In other words, this map represents the land substantially in the same condition as when the Corporation acquired it, is that correct?

A. That is true. [51]

Mr. Behnke: I think those are all the questions I have of Mr. Benedict.

Mr. Mahoney: That is all.

The Court: You may step down.

CHARLES C. MILLER

called as a witness herein on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Behnke:

Deputy Clerk Drew: Your full name, please?

A. Charles C. Miller.

Q. (By Mr. Behnke): Mr. Miller, what is your address? A. My home or office address?

Q. Your office address?

A. 326 West 3rd in Los Angeles.

Q. What is your business or profession?

A. I am a Civil Engineer.

Q. Are you licensed under the applicable provisions of the State law, as a Civil Engineer?

A. I am.

Q. How long have you been in the profession of a Civil Engineer? A. 29 years.

Q. Are you familiar with the Rancho Palos Verdes? A. Yes. [52]

Q. How long have you been familiar with the Ranch? A. Since 1936.

Q. And from time to time you have done work for the Corporation? A. Yes.

Q. Did you prepare the delineation of the portion sold to Snow on this map (indicating map)?

A. I did.

(Testimony of Charles C. Miller.)

Q. And do these portions in yellow and blue correctly delineate on that map the portions that were sold to Snow in 1944? A. Yes.

Q. At the time of that sale, did you cause to have the engineering and surveying work done in connection with that parcel? A. I did.

Q. When did you do that?

A. I don't know exactly, but it was sometime the early part of 1944.

Q. Was that parcel in the platted area designated on this map as Rolling Hills?

A. How is that again?

Q. Was that in the platted and subdivided area which is designated here as Rolling Hills?

A. No. It was outside of Rolling Hills. [53]

Q. In other words, there was no segregation or delineation of that property prior to the time that you surveyed it and engineered it for sale?

A. Nothing except the tax map that was prepared, and the tax parcels were delineated on the map. Then, later, the survey on the ground was made for the Snow purchase and that boundary of the Snow property was then put on this map.

Q. And the blue on the map indicates the tillable portions of that property?

A. Yes. That crop map was made prior to my connection with the Ranch, and the delineations of cultivated land I have just reproduced from the original crop map. I did not make the crop delineations myself.

Q. But those were the delineations on the maps

(Testimony of Charles C. Miller.)

that had been used by the Corporation in the past?

A. Yes; that is right.

Q. In connection with its farming activities, is that correct? A. Yes.

Mr. Behnke: I wonder if we could take this map down.

Mr. Mahoney: This is not in evidence.

Mr. Behnke: Oh, it is not in evidence?

Mr. Mahoney: No.

Mr. Behnke: I would like, your Honor, to introduce this [54] in evidence. It is Defendant's Exhibit B.

The Court: Do you want to introduce it as your exhibit?

Mr. Behnke: Yes, I would like to. It doesn't make much difference.

The Court: It may be marked Plaintiff's Exhibit next in order, then, and received in evidence.

(Said map, so offered and received in evidence, as aforesaid, was marked as Plaintiff's Exhibit No. 6.)

Q. (By Mr. Behnke: Now referring to this aerial photograph of the Ranch, could you point out to the Court approximately the area there which would be included in the Snow sale?

A. Yes, if I can get up closer to it. (The witness leaves the witness stand and stands before said map at the easel.) It would be in the area just south and west of the reservoir site as indicated here and some in here (indicating on said map).

(Testimony of Charles C. Miller.)

The Court: Will that map take a pencil marking?

Mr. Behnke: I do have some transparencies which I will introduce later into evidence, which will overlay that. I think they will delineate it clearly and exactly.

We can mark this for identification as Exhibit No. 7.

(A transparency was marked as Plaintiff's Exhibit No. 7, for identification.)

Deputy Clerk Drew: Plaintiff's Exhibit 7 for identification. [55]

Mr. Behnke: I will use some tacks.

(Said Exhibit 7 was overlaid on said aerial map upon the easel.)

Q. Now referring to Plaintiff's Exhibit No. 7, did you prepare this exhibit under the employment of the Plaintiff? A. Yes.

Q. And on this map you have in red color the Palos Verdes Water Company, or is it in orange?

A. That is in orange.

Q. In orange. That indicates, does it not, the existing line of the Water Company, of the Palos Verdes Water Company? A. Yes; it does.

Q. And that runs along this portion here (indicating on said exhibit) down to this—is this a subdivision here (indicating on said exhibit)?

A. That is locally known as Miraleste.

Q. And this line, this water line, do you know approximately what date that was put in?

(Testimony of Charles C. Miller.)

A. No, sir. It was prior to my connection with the Ranch in 1936.

Q. Prior to 1936? A. Yes.

Q. And this water line that runs along here, along the southern portion, is also the water line of the Palos Verdes Water Company? [56]

A. Yes, it is.

Q. And indicated on this map in blue are the water lines of the Rancho Mutual Water Company? A. Yes.

Q. And this water system (indicating on said exhibit) is for the purpose of servicing the Rolling Hills project proper? A. Yes.

Q. Now, the next indication on here is the Crest Road and it is this indication here (indicating) on the map in yellow? A. Yes.

Q. Is that a paved highway or a paved road?

A. Yes.

Q. And the blue mark in here (indicating on said exhibit) —now this, your Honor, is a projection of the Ranch out in this direction (indicating), which we were not able, of course, to get on this map here—what does that indicate?

A. That is colored green and that is Anaheim Street which was put on by the City, on a bond issue, and the bonds were issued against a strip 150 feet wide on each side of the boulevard and the bondholders foreclosed and took the 300 feet for improvement of the sixty, so the Corporation lost 360 feet in width there for the construction of [57] Anaheim.

(Testimony of Charles C. Miller.)

Q. This construction was put in by the governmental authorities (indicating on said exhibit)?

A. Yes.

Q. And this purple legend indication is the indication of the Coast Highway? A. Yes.

Q. And the highway that runs along the eastern portion of the Palos Verdes project and through the area which you indicated as sold to the Snows?

A. Yes.

Q. Were there any other existing paved roads as of the end of September 30, 1944, on this Ranch than are indicated?

A. That is the Palos Verdes Drive North that is shown in whatever color that is.

Q. Oh, this color here (indicating on said exhibit)? A. Yes.

Q. When was that put in?

A. I just know it was prior to 1936.

Q. Prior to 1936?

A. I think it was in the early '30's.

Q. Do these road legends indicate all of the paved roads which were on the Ranch as of September 30, 1944?

A. There is Gaffey Street that shows on the little insert there, running down between the green and the red.

Q. This portion here (indicating)?

A. No. Further over. That is Gaffey running down [58] there along the railroad right of way. That runs through what was at that time property owned by the Corporation, but that has been there

(Testimony of Charles C. Miller.)

more years than I know anything about. I don't know just when it was put through. That is one of the main roads down to San Pedro.

Mr. Behnke: I would like to introduce this into evidence, your Honor, as Plaintiff's Exhibit No. 7.

The Court: It may be received.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit No. 7.)

(Document marked as Plaintiff's Exhibit No. 8, for identification.)

Deputy Clerk Drew: Exhibit 8, for identification.

Q. (By Mr. Behnke): For the purposes of the record, Mr. Miller, you have placed these over the aerial photograph, and how do you place the overlay with respect to the Ranch property?

A. I have them move the overlay around until the roads shown on the photograph match with the roads of the overlay.

Q. Now, this is a map purporting to show the sales and gifts of land prior to September, 1944. Would you explain to the Court how you prepared this map?

A. Yes. I took the Corporation's records of sales and segregated those made prior to September, 1944, and then, from the descriptions and the parcel maps, a great [59] many of which I prepared myself. I located them on this map and colored them accordingly.

(Testimony of Charles C. Miller.)

Q. Now, the colors that you used, you have used an orange, you indicated for industrial purposes?

A. That is a solid orange.

Q. That is this particular orange here and this orange here (indicating on map)? A. Yes.

Q. And by that indication you have indicated the use to which that property was put by the purchaser?

A. It was the use permitted. I do not know what the purchaser did with it, but that was his right.

Q. To use it for industrial purposes?

A. Yes.

Q. And the pink designation indicates gifts that were made, and which portions are those, that gifts were made of land?

A. Up in the upper middle of the picture, there is a portion that was given to the Chadwick Seaside School and then down in the inset, a portion there at Palos Verdes Drive and Western, you see those two parcels——

Q. This portion here (indicating on map)?

A. Yes, both north and south of Palos Verdes Drive and the west side of Western was property that was donated to the County Housing [60] Authority.

Q. And do you recall which year that was done?

A. No, I don't remember the year.

Q. And the next legend shows "Property Acquired by Governmental Agencies."

A. That would be colored borders.

(Testimony of Charles C. Miller.)

Q. Colored borders in blue?

A. Yes. There is an area over here on the lower left hand corner of the property, the point is where the lighthouse is and then back of that and up to a portion of Crest Road, which was the part taken by the United States Government for gun placements during the War.

There is a tiny, little parcel in here (indicating on map) that was taken long before I came there; I don't know the exact date.

There is a little parcel up on Crest Road just north and east of the last piece I was speaking of.

There is an area down in the—incidentally, this (indicating on map) is what we locally call the Panhandle area along, that is at the south side of Palos Verdes Drive North and west of Gaffey—there is an area taken there by the United States for the Navy.

Then, up here at Narbonne and Palos Verdes Drive North, there was an area there taken by the Metropolitan Water District of Southern California.

Q. And the portions outlined in green, I don't see them [61] very well on this map.

A. Green doesn't show up against that kind of a background.

Q. If we put something in there——

A. I just put a white piece of paper in back of it. It would show it.

Q. And the portions that you delineated in green, what does that indicate?

(Testimony of Charles C. Miller.)

A. That is property that was deeded to members who were stockholders in the Corporation?

Q. To themselves? A. Yes.

Q. And the other delineation circled in pink color, they represent what?

A. That is sales to individuals rather than to members of the Corporation.

Q. Which would include the parcel sold to Snow, would it, on this particular map?

A. Yes.

Q. Could you on this map delineate the portion sold to Snow?

A. If I could have another piece of white paper, I could tell you.

The portion sold to Snow in 1944 were sales described as Parcels 1 and 2. Parcel 1 is the area on the westerly side of the boulevard, that is Palos Verdes [62] Drive East, and extending from Palos Verdes Drive North southerly, and the outline I indicate here; and then the parcel number 2, that is on the west side of Palos Verdes Drive East, which is indicated by this border here (witness indicating on map). That would be parcel No. 2.

Mr. Behnke: I would like to introduce this as Plaintiff's Exhibit No. 8.

The Court: It will be received.

(Said transparency, so offered and received in evidence, was marked as Plaintiff's Exhibit No. 8.)

(Testimony of Charles C. Miller.)

Mr. Behnke: Will you mark this as Plaintiff's Exhibit 9?

(Map marked as Plaintiff's Exhibit No. 9, for identification.)

Deputy Clerk Drew: Plaintiff's Exhibit No. 9 for identification.

(Said map, Exhibit No. 9, was placed on the easel and a transparency placed or overlaid on said map.)

The Witness: This is a map marked "Lands Assessed to Palos Verdes Corporation for Tax Bills for 1944-1945."

Q. (By Mr. Behnke): How was that prepared, Mr. Miller?

A. I just previous to this time prepared a tax map of property owned by the Corporation and broke it up into small parcels for tax purposes, and that was filed with the County as Assessment Map No. 50 containing 4 sheets. This map is a reduction in scale of those four sheets into [63] one and those parcels are shown and marked on the map identical with the ones on the assessment map. The 1944-1945 was the first year that they used this map for tax purposes, and I have taken those maps and colored in the areas which the Corporation was paying taxes on at that time.

Q. Then, that reflects the Tax Roll ownership as of March 1st, 1944, is that correct?

A. Yes.

(Testimony of Charles C. Miller.)

Q. And what are these indications in black on the map?

A. The numbers with the dollar sign in front of them are the Assessor's valuations of the parcels at that time.

Then, a number like here (indicating on said map), number 14, that is the parcel number.

304.6070 is the acreage.

And each parcel has the identifying number, the acreage and the Assessor's valuation.

Q. Then, these portions which are excluded are those portions that were not assessed to the Corporation as of that date, is that correct?

A. Yes.

Mr. Behnke: I would like to introduce this into evidence, your Honor.

The Court: It may be received.

Deputy Clerk Drew: Plaintiff's Exhibit [64] No. 9.

(Said map, so offered and received in evidence, as aforesaid, was marked Plaintiff's Exhibit No. 9.)

Mr. Behnke: You may cross-examine.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Miller, you made the survey for the Snow sale? A. Yes.

Q. Then, you also made the survey for all the other acreage sold in that year?

A. Yes. What year?

(Testimony of Charles C. Miller.)

Q. The year 1944? A. Yes.

Q. Or correctly, the taxable year ending September 30, 1944? A. Yes.

Q. Now, you stated that your Exhibit 7, which is an overlay showing roads, the paved roads on the Rancho Palos Verdes, showed all the paved roads that were on the Ranch at the time the overlay was drawn, or all the roads that were paved in the year 1944. Were there other unpaved dirt roads on the Ranch at that time?

A. Oh, there are quite a few farm roads there, but no public road.

Q. But there were dirt roads running throughout this property? [65] A. Yes.

Q. Do you know what these roads were used for at that time?

A. Well, for farming purposes.

Q. And how would you classify those roads, as improved dirt roads or plain unimproved dirt roads? A. We just call them farm roads.

Q. Are they accessible to automobiles?

A. We drive over them with automobiles, yes, but they aren't open to the public.

Q. They were private roads of the Rancho?

A. Yes; and I understand that each time they cultivated the land, when they started driving again they had a different road; they didn't maintain the same location all the time with these same farm roads, except where they had to cut a gash around a hill to get around it.

(Testimony of Charles C. Miller.)

Q. Are these roads too numerous to indicate on the map?

A. Well, they are probably not too numerous to indicate, but I don't have any means by which I could draw them on the map and they are more or less floating.

Q. In relation to Plaintiff's Exhibit No. 8, which is an overlay on the aerial photograph, you mentioned certain gifts of the Corporation. Did these gifts occur in the taxable year ended September 30, 1944, or were they over a period of time?

A. I don't think you understood the situation. I [66] wouldn't imply that there were gifts to members of the Corporation. There were parcels, as I understood, sold to members of the Corporation. The gifts were to other organizations, like the County Housing Authority and the Chadwick Seaside School.

The Filiorum area is a large tract of land that the various members of the Corporation acquired for their own personal use.

Q. Then, these areas that you had mentioned on Plaintiff's Exhibit No. 8 were actually sales to the stockholders of the Corporation?

A. That is my understanding, yes.

Q. Did the overlay that is labeled Plaintiff's Exhibit No. 8 include only acreage sales made in the year 1944, or did it include acreage sales made in earlier years?

A. It had sales made in earlier years, yes.

(Testimony of Charles C. Miller.)

Q. How far back did the sales go?

A. Well, I don't know how far back. Some place in the '30's, I believe, particularly the Filiorum area; they were all made in the '30's, that is to the corporate owners.

Q. Have you made any subsequent surveys of the area sold to the Snows in 1944? A. Yes.

Q. Has any of that property been used for subdivision purposes? [67] A. Yes.

Mr. Mahoney: No further questions.

The Court: You may step down.

Mr. Behnke: Mr. Vanderlip.

The Court: Do you want Mr. Miller any more?

Mr. Behnke: No, your Honor. He may be excused so far as we are concerned.

FRANK A. VANDERLIP, JR.

called as a witness herein on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Behnke:

Deputy Clerk Drew: State your name, please?

A. Frank A. Vanderlip, Jr.

Q. (By Mr. Behnke): Mr. Vanderlip, what is your address? A. Palos Verdes Ranch.

Q. Are you now President of the Palos Verdes Corporation? A. I am.

Q. Are you also a member of the Board of Directors of the Corporation? A. I am; yes.

(Testimony of Frank A. Vanderlip.)

Q. How long have you been a member of the Board of Directors? A. Since 1932.

Q. And have you served in other capacities, other offices [68] of the Corporation than President? A. Yes.

Q. And as such officer and member of the Board are you familiar with the operations and activities of the Corporation? A. Yes, sir.

Q. You have listened to the testimony of Mr. Benedict, the Chairman of the Board?

A. I did.

Q. And do you have knowledge of the matters to which he testified? A. Yes.

Q. And if you were asked the same questions that were asked him under oath on direct examination, would your answers be substantially the same—— A. They would.

Q. (Continuing): As to the matters to which he testified? A. Yes.

Q. Now referring to this Plaintiff's Exhibit 7 showing the water lines and the roads, this road which was put in here (indicating on map) along the southerly portion and eastern portion of the property, do you know when that was put in?

A. It was put in sometime between '24 and '26.

Q. Was it put in prior to the formation of the Corporation [69] itself?

A. I couldn't be perfectly sure of that. Certainly some of the money that came from the sale of Palos Verdes Estates was used for the purpose of putting in those roads.

(Testimony of Frank A. Vanderlip.)

Q. And this road that is indicated in pink here, along here (indicating on map), and with the extension out here (indicating), was that improvement made by the Corporation?

A. The part in pink that goes to the section in blue was made by the County. The part in pink that goes east from the reservoir was done at the same time, in '24 to '26, that Palos Verdes Drive South and East was built.

Q. And this portion in green Mr. Miller testified as put in under a bond assessment by a governmental authority.

A. Well, actually it was put in before '13 or when we acquired the ranch, but it was widened and paved at some point later on, when the assessment was put on it.

Q. Now, when the Corporation acquired this property what was the character of the land insofar as improvements were concerned on the ranch?

A. When the Corporation acquired the property?

Q. Yes.

A. I can't be sure which side of the Corporation's acquisition of the property those roads were actually put in, [70] but shortly after that the roads were completed as shown on the map and a water pipe was brought from Palos Verdes Estates——

Q. This map shows the water line from the Palos Verdes Water Company, and on the north,

(Testimony of Frank A. Vanderlip.)

that was put in not by the Corporation? Was it put in by the Corporation?

A. The Corporation bought sufficient stock in the Palos Verdes Water Company to put in the line on the southwest. The remainder was all put in by the Palos Verdes Water Company with money they got from Palos Verdes Estates.

Q. And what was the purpose of this water line that ran from the Palos Verdes Estates into this area here (indicating on map)?

A. Well, primarily for irrigation.

Q. Irrigation in connection with the farming activities of the Corporation? A. Yes.

Q. And what use was put by the Corporation of the roads that were indicated here on the map?

A. I believe after we built the roads they were dedicated to the County that subsequently did the paving on them. Then they became public roads.

Q. And are those roads used in connection with your farming activities? [71]

A. Well, of course, it was the only reasonable access to the farm land.

Q. And this road indicated in green across the center of the property, I believe that is known as Crest Drive, is it not? When was that put in?

A. About 1922.

Q. And what was the purpose of putting that road in?

A. So as to get reasonable access to the high parts of the ranch.

Q. Calling your attention to the portions in blue,

(Testimony of Frank A. Vanderlip.)

that indicate the water lines of the Rancho Mutual Water Company; is that right? A. Yes.

Q. And that is a separate corporation from the Palos Verdes Corporation? A. It is.

Q. And the use of that was in connection with the subdivided portions of Rolling Hills, was it not?

A. Yes.

Q. Referring to the section that was sold to Snow during the year 1944, did the Corporation, prior to its sale, make any improvements on that particular real property? A. No.

Q. The only improvement was one that had existed [72] since approximately 1924, when this road was put in? A. That is right.

Q. And this water line here (indicating) was not put in by the Corporation at that time?

A. No.

Q. In fact, that is the water line of the Palos Verdes Water Company, which is a separate corporation? A. Yes.

Q. And this land has been used by the Corporation since 1926, in connection with its farming activities? A. Farming, mining, grazing.

Q. And grazing. And of this area approximately how much is tillable land, that is suitable for farming purposes? A. About 40 per cent.

Q. About 40 per cent. And did the Corporation make a maximum use of the land insofar as they could, to the extent of its tillability for farming operations? A. I hope so.

(Testimony of Frank A. Vanderlip.)

Q. Now, could you indicate to me where on this map might be indicated the so-called mining operations of the diatomaceous earth?

A. The lease to the Dicalite Mining Company is this area in there which you can see in white, which has been mined (indicating on map). [73]

The Livingston quarry is in this section (indicating on map).

Graham Brothers quarry is in that section (indicating on map).

And Livingston Brothers have quarried this section (indicating on said map).

Q. Those properties were leased to the various organizations that you refer to? A. Yes.

Q. Under a royalty basis or some other basis?

A. Yes.

Q. And throughout the years, then, you have derived substantial income to the Corporation from those sources? A. Yes.

Mr. Behnke: And that I think is indicated, your Honor, in the Stipulation, the amount.

Q. Did you also, from time to time, lease the property for oil exploration?

A. We have at various times.

Q. You have? A. Yes.

(Map and overlay transparency were placed on the easel.)

Q. Mr. Vanderlip, referring to Plaintiff's Exhibit 1 showing the parcels of land sold prior to September 30, [74] 1944, now, these sales were made

(Testimony of Frank A. Vanderlip.)

over the period of the corporate existence, and some of the parcels were sold by the Syndicate prior to the formation of the Corporation, is that correct?

A. I believe the Syndicate only sold what is called Palos Verdes Estates. They might have sold one or two other small pieces, but I doubt it.

Q. That is this area indicated here (indicating on map)? A. That is right.

Q. And the portion off the map indicated——

A. Well, it is right where your finger is there.

Q. Here, Miraleste? A. Yes.

Q. And that portion was subdivided and improved by the Palos Verdes Estates?

A. That is right.

Q. And the Corporation has had no interest in either of those parcels since the date they were sold in 1923, is that correct? A. That is right.

Q. Now, in 1926, was there a sale made to one F. A. Vanderlip? A. Yes.

Q. Was that the only sale that was made during that year? A. I believe so. [75]

Q. And what was there sold in that year? Could you indicate?

A. This section in here (indicating on map) was sold in that year, for a home site.

Q. For a home site? A. Yes.

Q. And F. A. Vanderlip was your father?

A. That is right.

Q. And prior to that time he had acquired certain acreage in this area (indicating on map), had he not? A. No, not prior to that time.

(Testimony of Frank A. Vanderlip.)

Q. Not prior to that time. Did he acquire land subsequent to that time, from the Corporation?

A. Yes.

Q. When did he subsequently acquire land from the Corporation?

A. I believe the next year he bought the piece in here (indicating on map). Then, 2 or 3 years later, he bought the remaining part up there (indicating on said map).

Q. And did other members of the Corporation buy land from the Corporation? A. Yes.

Q. What parcels were they? Would you point out the parcels and tell us the names of the people who purchased [76] them?

A. Well, this piece here (indicating on map) went to my aunt, to Mr. and Mrs. Harden.

Mr. Charles Schwedtman bought that piece (indicating on said map).

Mr. E. D. Levinson this piece (indicating on said map) and Mr. Benedict that one (indicating on said map).

Q. And was that land subsequently put into a corporation, a separate corporation?

A. The land that my father bought was put into a corporation.

Q. Was that the Filiorum Corporation?

A. Yes.

Q. What were the circumstances in connection with each one of those sales; how were they made?

A. Well, various stockholders would come out to the ranch and look it over, at various times, and

(Testimony of Frank A. Vanderlip.)

decide they wanted to build a cottage or house somewhere and my father was President of the Corporation, then, and I guess they asked him if they could buy something.

Q. Was there any advertisement made——

A. No.

Q. ——in connection with those sales?

A. No.

Q. Those were sales which were negotiated between the [77] members of the group that were stockholders of the Corporation? A. Yes.

Q. And down through the years were there years when no sales were made?

A. Yes, a number of years.

Q. In a number of years would you say there were no sales at all made? A. Yes.

Q. And during many years a single sale might have been made? A. Yes.

Q. And referring to the Stipulation of Facts, coming down to the year 1939, when one sale was made, was this sale made to I. W. Morse?

A. Yes.

Q. What parcel was sold to him?

A. He bought a section over here next to Miraleste to develop.

Q. How did that sale arise?

A. Well, he was a local real estate man and he had been doing some selling in Miraleste and thought the roads, more or less, naturally would extend into that section (indicating on map) and wanted to do it for his own benefit.

(Testimony of Frank A. Vanderlip.)

Q. And there was also another sale, was there not, in that [78] year to Walter Limacher; do you recall that sale?

A. Yes. He bought a piece up here (indicating on said map).

Q. That is outside of Rolling Hills?

A. Outside of Rolling Hills, but contiguous to it.

Q. And those were the only two sales in 1939?

A. Yes, sir.

Q. And in 1940, a sale was made to the Metropolitan Water District?

A. Yes. That is this piece here (indicating on said map).

Q. I think that is not the one. There is .140 acres. Is that it?

A. Well, that would be a part of that. When they bought the original piece, they had to swing a new alignment of the road because the old road went through a part of the section where the reservoir was and they had to evidently fill out their original holding.

Q. Oh, they had purchased prior to that time, in 1938, the large block? A. Yes.

Q. Was that the only sale that was made during 1938, of the Ranch property? A. I believe so.

Q. What were the circumstances of making that particular sale? [79]

A. The Metropolitan Water District surveyed the area. They have to have a reservoir at the terminal end of the mains. As I remember, they

(Testimony of Frank A. Vanderlip.)

decided that this piece of ground was high enough and relatively earthquake-proof, so they picked it.

Q. Was there a broker involved in the transaction?

A. I believe that they dealt purely with Mr. Hanson.

Q. He was your General Manager at that time?

A. Yes.

Q. Now, during the year 1941, there occurred eight sales, I believe. There was one sale to Graham Brothers, Inc. Could you designate that parcel?

A. That was a piece of ground here (indicating on said map) where they had been doing some quarrying under lease and they bought the quarry site.

Q. And did the Corporation advertise that prior to its sale? A. No.

Q. Did the Graham Company come to the Corporation and make an offer to buy that?

A. Yes.

Q. And at that time the Corporation deemed it acceptable and the sale was consummated with them, is that correct? A. Yes.

Q. And during 1941, there was another sale to the [80] Press-Wireless Company?

A. That is this section here (indicating on said map).

Q. Approximately how many acres were involved in that sale?

A. Something over a hundred, I think; I think it was 105 or 104.

(Testimony of Frank A. Vanderlip.)

Q. What were the circumstances of that sale?

A. There were some people who wanted to do some radio work and they needed high land and looked over the area and decided that that section did them the best job. So they asked if they could buy it.

Q. And the Corporation was willing at that time to sell it to them, to negotiate the sale?

A. Yes.

Q. Now, also in that year a sale occurred to the Denni Investment Company; which property was that?

A. That is beyond the Panhandle and it was in this neighborhood (indicating on said map).

Q. And do you recall the circumstances of that particular sale?

A. Well, I believe Denni had done some of the road work at Rolling Hills and we preferred to trade land with him and paid a bill.

Q. What was done with that land subsequently, do you know, to your knowledge? [81]

A. Well, it now belongs to the Union Oil Company.

Q. Was it subdivided and developed at all by Mr. Denni?

A. No. It is wholly commercial.

Q. Commercial property?

A. Yes.

Q. And during the subsequent years, down through 1944, a number of acreage sales were made. On these sales that were made, were the areas which were sold platted on any subdivision map prior to sale?

A. No.

(Testimony of Frank A. Vanderlip.)

Q. Were they improved prior to sale, by the Corporation, in any way?

A. Well, only accidentally by such roads as might previously have been put in.

Q. And those parcels were surveyed and described by metes and bounds?

A. That is right.

Q. At the time of the sale? A. Yes.

Q. And delineated for purposes of the sales?

A. Yes.

Q. Were those sales the result generally of the activities of the Manager, Mr. Hanson, or of Mr. Lawyer, whoever might have been involved in that particular time?

A. Well, they would have been entirely in Mr. Hanson's [82] administration.

Q. This gift to the Chadwick School in 1944, that was this area here (indicating on map)?

A. Yes.

Q. What was the purpose of making that gift to the School?

A. Well, the Chadwick School had started in San Pedro and had done a fine job. A neighbor in Palos Verdes Estates said he would build some buildings if we could give him an appropriate piece of land and my father, who has always been in favor of education, gave them a piece of land.

Q. In connection with these sales, you say that there was no "For Sale" signs put on the Ranch?

A. Not to my knowledge.

(Testimony of Frank A. Vanderlip.)

Q. Was Mr. Hanson authorized to put out any "For Sale" signs on the Ranch?

A. I have no recollection of his asking permission to.

Q. And there were no real estate offices on the Ranch, other than in the Rolling Hills section?

A. No.

Q. Now then, in making these sales, was there any policy or course of conduct that the Board of Directors endeavored to follow in making the particular sales that were involved?

A. Well, it certainly was our policy to hold the main body of the ranch intact for a single sale, when we were [83] under pressure, as a matter of considering the sale of areas that wouldn't hurt such a sale. On that account there were a few sales that were made on the north side of Palos Verdes Drive North, which was really outside of the main body of the Ranch and facing on to the Dicalite mine which was here (indicating on map), so they weren't really very fine home sites. A few people wanted land outside of Rolling Hills and they were sold acreage pieces. But, generally, the idea was that, if we had to sell something, to sell it around the periphery where the main bulk could be kept for a block sale.

Q. During the year 1944, we have a sale made to one Snow of 422 acres. Are you familiar with the circumstances as to how that sale arose and what transpired?

A. Dr. Snow lived in the neighborhood and had

(Testimony of Frank A. Vanderlip.)

told Moore that he liked some of the land and Moore came to Hanson and said, "What can we sell him? He has got so much money to spend." And they spent some days walking and riding over the hills until Dr. Snow more or less delineated what he wanted, and a price was set and he bought it.

Q. Who is this Moore that you are referring to?

A. He is a local real estate agent.

Q. Now, this real property which was sold to Snow, had that been used by the Corporation in connection with [84] its farming activities?

A. That is right.

Q. And was income being derived from that?

A. Yes.

Q. At the time of the sale? A. Yes.

Mr. Behnke: We have here a folder of the leases of the Corporation for 1944. I would like to have this marked as Plaintiff's next exhibit. No. 10, is it?

Deputy Clerk Drew: Plaintiff's Exhibit No. 10 for identification.

(Said document was marked by the Deputy Clerk as Plaintiff's Exhibit No. 10 for identification.)

Q. (By Mr. Behnke): I ask you if you can identify this document? A. Yes.

Q. And this is a crop sharing farm lease?

A. That is right.

Q. And was this one of the two types of leases

(Testimony of Frank A. Vanderlip.)

that were used by the Corporation in leasing its property? A. Yes.

Q. And that is the type, being the cash lease rather than a crop sharing arrangement, as this provides? A. Yes.

Q. And this lease is dated October 1, 1943, and it is [85] for a term beginning on that date and ending September 30, 1944. Does this lease cover portions of the tillable land that was sold to Snow?

A. Yes, sir.

Q. O.K. Can you indicate which portions, in this lease, were sold in the Snow parcel?

A. Well, it appears to be parcels: Section 3, Parcel 3, parts 4, 5, 6, 7, 8, 9 and 10.

Q. And this lease is signed by Mr. Harold M. Thorsen. Was he the lessee at that time?

A. Yes.

Q. I note that it was not executed by the Corporation. Has it been a custom or a practice that the file copies are not executed?

A. It might have been, then.

Q. However, an executed lease, executed by the Corporation, was delivered to Mr. Thorsen, was there not? A. Yes.

Q. And this is the lease under which the Corporation operated so far as that property was concerned during that period of time? A. Yes.

Mr. Behnke: I would like to introduce this in evidence, your Honor.

The Court: It may be received. [86]

Deputy Clerk Drew: Exhibit 10 in evidence.

(Testimony of Frank A. Vanderlip.)

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit No. 10.)

PLAINTIFF'S EXHIBIT No. 10

Crop Share Farm Lease

* * *

Reservation for Surveying, Oil Well Drilling, etc.

15. Lessor reserves for itself, its employees, agents, assignees, and licensees: The right to enter upon such portion of the premises as it may desire and survey the same; also the right to construct roads, streets, pipe lines, and do similar work of construction, and to erect and construct telegraph and telephone lines upon such part of said premises as it desires, and thereafter to use such roads, streets, telegraph, telephone, and pipe lines, and other construction work; and, further, the right to enter upon said premises and prospect and/or drill for and/or produce oil, gas, asphaltum, naphtha, and other minerals and like substances thereon, and to use such portion of the premises as it desires for such purpose, together with a reasonable space for machinery, tanks, and such equipment and machinery as may be necessary in connection with such work. It is understood that all such work shall be done with as little damage as possible to any crops growing on the premises at the time, and that dam-

(Testimony of Frank A. Vanderlip.)

ages shall be claimed by Lessee only in such cases as actual construction work is done and not for any surveying or engineering work. Lessor shall pay Lessee only actual damage resulting from such entry, work, and use and damages shall not include prospective or speculative damage to any crop but shall be limited to the actual expenses incurred by Lessee in preparing the land and planting the crops.

* * *

Received in evidence May 1, 1951.

Q. (By Mr. Behnke): During this year of 1944, would you tell me approximately how many acres were under farming operations during that year?

A. In the entire Ranch, or in that piece?

Q. In the entire Ranch? A. About 4,000.

Q. The lease, itself, covers only the tillable portions of the Ranch, is that correct? A. Yes.

Q. What about the other portions of the Snow property that are not included in that lease, was there any commercial use made by the Corporation of those areas?

A. Some sheep were being run on the Ranch at that period and they were grazing in the canyons and on the untillable areas.

Q. And was income then derived from that source, to the Corporation? A. Yes.

(Testimony of Frank A. Vanderlip.)

Q. And the areas not tillable on the Snow property were used for this grazing purpose, as well as the other canyons?

A. Well, such areas as were appropriate for grazing. [87]

Q. Since the Corporation acquired this property in 1926, has the Corporation bought any other properties?

A. Outside of the original area, no.

Q. And during this period of time it has only sold its own property, is that correct?

A. That is right.

Q. The Corporation has never acted as a broker or development company for any other persons?

A. No, sir.

Q. During this year what would you say were the varied activities of the Corporation, during 1944, and prior?

A. Well, farming, mining and grazing were our main sources of income.

Q. Did it have any other activities?

A. It sold a piece of real estate now and then.

Q. It had the Rolling Hills project?

A. Yes.

Q. And it was endeavoring to dispose of all or substantially all of its real property?

A. Yes, from the inception of the Corporation.

The Court: Just a moment. Read that last question and answer.

(Record read by the Court Reporter, as requested.)

(Testimony of Frank A. Vanderlip.)

Q. (By Mr. Behnke): It was endeavoring to dispose of its property substantially in the condition in which it [88] acquired it? A. Yes.

Q. Now, during this year 1944, there were other sales of acreage parcels by the Corporation, were there not, outside of the Rolling Hills development?

A. Yes, a few.

Q. And as to these other acreage sales, does the Corporation claim that they should be treated as capital assets the same as the Snow parcel?

A. Well, I believe that an error was made in not making claim for such, but we do.

Q. You mean that the claim which was made should have included the other acreage sales that were made during that year? A. Yes.

Mr. Behnke: You may cross-examine, counsel.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Vanderlip, when did you become President of the Palos Verdes Corporation?

A. I have been President twice. I have recently become President, on the 1st of October, 1950.

Q. And the previous period?

A. From 1937, until about 1940.

Q. I notice that some of these sales were [89] handled through a Vanderlip. Are you a broker?

A. No.

Q. During the years 1935, up until 1942, or 1943, there was quite an amount of delinquent real property taxes upon the entire Rancho, was there not?

(Testimony of Frank A. Vanderlip.)

A. Yes.

Q. When were these taxes finally paid?

A. I believe about 1943.

Q. 1943?

A. I am not perfectly sure of that. No. I am wrong about that. They were paid after the Snow sale that we are talking about, because that was part of the money that was used to pay those taxes.

Q. You spoke of certain water lines that were set out through the Rancho by the Palos Verdes Water Company and were used for industrial purposes. Those same lines could be used for residential purposes, could they not? A. Yes.

Q. And this Rancho Mutual Water Company of which you spoke is a part of the Rolling Hills development?

A. I guess the answer to that is yes. I don't know just what you mean by a part of it.

Q. Well, it was incorporated into a service of the Rolling Hills development?

A. That is right. [90]

Q. The majority of the stock of that Company is owned by the Palos Verdes Corporation, is it not? A. At the present time, yes.

Q. Now, are you aware of the restrictions that were in the Snow deed? A. No; I am not.

Q. Are you aware of any restrictions that were in any of the other acreage sales that took place between the years 1939 to 1944, restrictions as to use?

(Testimony of Frank A. Vanderlip.)

A. Well, generally speaking, the land was restricted to single-family dwellings.

Q. Was it the policy of the Corporation to place those restrictions in all deeds of acreage?

A. Where it seemed appropriate. Now, we can't say all of it, because certainly it ends on the property—the property on the Panhandle is not so restricted.

Q. In other words, the property sold for industrial purposes was not so restricted?

A. That is right.

Q. But all other property was so restricted?

A. Yes.

Q. You mentioned certain sales to stockholders of the Corporation. My understanding is that they occurred in the late '20s or early '30s; is that correct?

A. That is right. [91]

Q. At one time the Palos Verdes Corporation, as a part of its public relations were playing a radio program in Long Beach, were they not?

A. I have no recollection of it. What was the date?

Q. On all these sales of acreage, whether the sale was made by the manager, vice-president or by others, a commission was paid?

A. I believe so.

Q. I mean there were no sales on which there was not a commission paid?

A. No.

Q. In the year 1944 where was the Corporation's office located?

A. In the gate house at Rolling Hills.

(Testimony of Frank A. Vanderlip.)

Q. Was there also a real estate brokerage house in the gate house at Rolling Hills?

A. I believe so.

Q. You stated that the land that was sold to the Snows was to a certain extent under lease for crop purposes at the time of sale. What was done with the lease at the time of the sale?

A. The sale was doubtless made subject to the lease. The lease was dated in October. By that time of year the hay was probably off the ground; and I wouldn't be surprised if Snow continued to lease to Thorsen—I don't know. [92]

Q. Mr. Vanderlip, I call your attention to Plaintiff's Exhibit No. 10, which is a copy of the crop lease to Harold M. Thorsen, and calling your attention to paragraph 15 of the lease, was that clause substantially the same in all leases made by the Corporation? A. Yes.

Q. For farming on a crop sharing basis?

A. Yes, sir.

Mr. Mahoney: No further questions.

Mr. Behnke: No further questions.

The Court: That is all.

Mr. Behnke: The Plaintiff's rests, your Honor.

(Whereupon the Plaintiff rests its case.)

Mr. Mahoney: The Defendant has no further evidence, your Honor.

The Court: Is there any argument?

Mr. Behnke: I would like to argue it, your Honor. I did not expect that we would finish to-

day, so I did not bring my books and documents that are necessary for legal argument. Would it be possible to set aside some time tomorrow for argument, or would you prefer to have the matter submitted on written briefs?

The Court: We have a case that goes to trial tomorrow. The Clerk calls my attention to the fact that tomorrow's case is set for 2:00 p.m., so if you care to, you can come [93] in tomorrow morning. How long do you want to argue?

Mr. Behnke: I would like to have about three-quarters of an hour, which I think will be sufficient.

The Court: All right.

Mr. Mahoney: About 20 minutes, your Honor.

The Court: About 20 minutes——

Mr. Behnke: It may be that I can cut mine down a little bit. I think we will both take an hour and a half in all.

The Court: We will continue it until 10:00 o'clock tomorrow morning.

Mr. Behnke: Thank you, your Honor.

(And thereupon an adjournment was taken until the following day, Wednesday, May 2, 1951, at the hour of 10:00 a.m.) [94]

Certificate in Re
Proceedings of May 1, 1951

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 10th day of May, A.D. 1951.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed August 17, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 68, inclusive, contain the original Complaint; Answer; Stipulation of Facts; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Two Designation of Record on Appeal and Motion and Order Extending Time to Docket Appeal and a full, true and correct copy of minute order entered May 3, 1951, which, together with copy of reporter's transcript of proceedings on May 1, 1951, and original plaintiff's exhibits 1 to 10, inclusive, and original defendant's exhibits A to L, inclusive, transmitted herewith,

constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of September, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13116. United States Court of Appeals for the Ninth Circuit. Palos Verdes Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 30, 1951.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals,
Ninth Circuit

No. 13116

PALOS VERDES CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY UPON
APPEAL TO THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

(1)

Comes Now the Appellant in the above-entitled matter and sets forth the following points on appeal to the United States Court of Appeals, Ninth Circuit, upon which it intends to rely:

I.

The Findings “that all sales of unsubdivided real property were subject to restrictions in the deed preventing use of the property except for residential purposes” contained in Article XVIII of the Findings of Fact are erroneous and not supported by the evidence.

II.

The Findings “that although plaintiff made thirty-four (34) additional sales of unsubdivided property

in the fiscal year ending September 30, 1944, which were reported as ordinary income, it has not at any time contended that this acreage represented a capital asset," contained in Article XIX of the Findings of Fact are erroneous and not supported by the evidence.

III.

The Findings "that the plaintiff was engaged in the real estate business" contained in Article XXIV of the Findings of Fact are erroneous and not supported by the evidence insofar as said Findings relate to the sales by plaintiff of the unsubdivided portions of its real property.

IV.

The Findings "that the plaintiff was continuously engaged in the sale of its subdivided and unsubdivided portions of its property" contained in Article XXV of the Findings of Fact are erroneous and not supported by the evidence insofar as said Findings relate to the sales by plaintiff of the unsubdivided portions of its real property.

V.

The Conclusions of Law "that the plaintiff advertised all of its property for sale to the general public and was willing at all times to sell a portion or all of its unsubdivided realty" contained in Article I of the Conclusions of Law are erroneous insofar as said Conclusions relates to the advertising of the unsubdivided portions of plaintiff's real property.

VI.

The Conclusions of Law “that the parcel of land sold to one Snow in July, 1944, was not a capital asset nor an asset used in plaintiff’s trade or business but was held primarily for sale to customers in the ordinary course of business” contained in Article II of the Conclusions of Law are erroneous.

Respectfully Submitted:

RILEY AND HALL,

By /s/ WILLIAM D. BEHNKE,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 23, 1951.

No. 13116.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOS VERDES CORPORATION, a Corporation,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPELLANT'S OPENING BRIEF.

RILEY & HALL, and

WILLIAM D. BEHNKE,

417 South Hill Street,

Los Angeles 13, California,

Attorneys for Plaintiff-Appellant.

JAN 14 1952

PAUL P. O'BRIEN

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No. 13116.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOS VERDES CORPORATION, a Corporation,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

(Numerals in Brackets refer to Pages of Record.)

This is an action for refund of income taxes arising under the Revenue Code of the United States, 26 U. S. C. A. Int. Rev. Code, Sec. 117. The action was commenced by the filing by plaintiff-appellant, PALOS VERDES CORPORATION, herein at times referred to as the "Corporation" on April 11, 1951, of a complaint FOR REFUND OF INCOME TAX AGAINST THE UNITED STATES OF AMERICA [3 to 14, inclusive].

Harry C. Westover, the Collector of Internal Revenue, 6th District of California, to whom the income tax herein

involved was paid in his official capacity as such Collector was not in office at the time of filing this action [17].

Said action was authorized against the United States of America as party defendant, 28 U. S. C. A., Sec. 1346(a)(1).

On December 15, 1944, the Corporation filed with the Collector of Internal Revenue, 6th District of California, the corporation income tax and declared value excess profits tax return for the period commencing October 1, 1943, and ending September 30, 1944, and paid to said Collector the sum of \$17,066.36 [17]. Thereafter the Corporation filed its claim for refund in the amount of \$5,467.88, with said Collector, Harry C. Westover, on March 9, 1945 [17], and the Corporation again filed its claim for refund with said Collector, Harry C. Westover, on October 30, 1946, in said same amount, to-wit, \$5,467.88 [18].

Said claims for refund were duly and timely filed. 26 U. S. C. A., Sec. 322(b).

By letter to the Corporation dated August 4, 1949, the Commissioner of Internal Revenue of the United States disallowed said claim for refund [18].

Said action for refund of income tax was timely and properly brought. 26 U. S. C. A., Sec. 3772(a)(1)(2).

Defendant, United States of America (herein at times referred to as "Government") filed its answer to said

complaint [14 to 16, inclusive], and the trial of said action was held on May 2, 1951 [60]. By its minute order dated May 3, 1951 [60], the Court entered an order that judgment be for the defendant.

Findings of Fact and Conclusions of Law were filed July 10, 1951 [60 to 69, inclusive]. Judgment was made and filed July 10, 1951 [69, 70].

Notice of appeal by the plaintiff was filed on July 28, 1951 [71], under the provisions of Fed. Rules Civ. Proc., Rule 73. Plaintiff filed its DESIGNATION OF RECORD ON APPEAL on August 16, 1951 [71, 72]. The defendant filed its COUNTER DESIGNATION OF CONTENTS OF THE RECORD ON APPEAL on August 22, 1951 [73].

On August 29, 1951, a MOTION FOR ORDER, AND ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL was made and filed [74, 75].

On October 23, 1951, plaintiff-appellant filed its STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY UPON APPEAL TO THE UNITED STATES COURT OF APPEALS, 9th Circuit [186, 187, 188].

This Court has jurisdiction to review the judgment of the United States District Court in this matter under the provisions of 28 U. S. C. A., Sections 1291 and 1294.

Statement of the Case.

Plaintiff-appellant is a corporation organized November 27, 1925, under the laws of the State of Delaware with its principal office and place of business located in the city of Wilmington, County of Newcastle, State of Delaware [18]. Since 1926 the Corporation has transacted and is doing business in the County of Los Angeles, State of California [18]. The Corporation took over from Palos Verdes Syndicate as of January 1, 1926, approximately 12,245 acres of land in the County of Los Angeles, State of California, with other assets, giving in exchange therefore 54,000 shares of its common stock, having an aggregate par value of \$5,400,000 issued pro rata to the members of the Syndicate as their interests appeared [18]. Said land was and is known as "Rancho Palos Verdes" [18]. Said Rancho Palos Verdes originally comprised approximately 16,004 acres of unimproved real property in the County of Los Angeles [82]. It was acquired by a group of persons known as the Palos Verdes Syndicate in the year 1913 [63]. After acquisition, the Palos Verdes Syndicate appointed a General Manager to operate and manage the ranch, and it engaged in farming activities [81]. After holding the land for a period of ten years, the Palos Verdes Syndicate decided to sell the whole parcel and entered into an agreement to sell in the year 1923 [83]. The whole sale was not consummated by reason of the fact that the purchaser was unable to raise sufficient moneys to buy the whole Rancho [105]. Two portions of the Rancho were actually sold, to-wit, 3,000 acres in the northerly and westerly edge of the Rancho and 200 acres on the southerly and easterly edges of the Rancho [83]. Then this land was deeded to the Bank of Italy, in trust,

for subdivision and development purposes [84]. Said portions were later subdivided, developed and handled by the Bank of Italy and became known as "Palos Verdes Estates" and "Miraleste," respectively [84]. Neither the Palos Verdes Corporation nor the Palos Verdes Syndicate had any further interest therein from the date of sale [83].

After the formation of the Corporation, there were no changes in its activities, and it continued to hold the real property and to engage in farming activities as its predecessor in interest, Palos Verdes Syndicate, had done before [86]. A General Manager was appointed who made contacts with farmers, share croppers and for some cash farming rentals and looked after the payment of taxes and matters relating to the valuation of the land by the Assessors [86].

The affairs of the Corporation were handled by a managing Vice President [106]. The Vice President and General Manager rendered annual reports for the benefit of the Board of Directors and the stockholders on his stewardship [114, 115, 141]. Statements made by him in the annual reports were matters to be considered by the Board of Directors and did not necessarily reflect policy of the Corporation as such [142]. Said annual reports in parts indicated that the only financial solution for the Corporation was to sell its lands as farming was unprofitable; that the land was becoming exhausted from farming and mineral extraction [135]; that its lands were valued so high for taxation purposes [129] that it was unprofitable from a farming standpoint [125]; that the taxes were greater than its farm income [135]; and that the future of the Corporation lies in the development and sale of its real estate [130,

131, 135]. The recommendations that the future of the Corporation lies in the development of its real estate was not acted upon, as no subdivision, development and improvement of the acreage lands was undertaken by the Corporation [95, 147, 171, 172] (outside the Rolling Hills development).

The reasons for the formation of the plaintiff-appellant Corporation were that Palos Verdes Syndicate was a very loose form of holding title to the real property and was not satisfactory in connection with the administration thereof [85]. Since the formation of the Palos Verdes Syndicate one or more of the original members had died, and estates were involved, and it was thought desirable to change the form of ownership to that of a Corporation [85, 86]. At the time of the hearing of this action, all members of the original Palos Verdes Syndicate were dead, except one who is very aged and outside the State of California [79, 80].

The Corporation, from its inception, endeavored to sell all its real property, substantially in the same condition in which it had acquired it [97, 143, 145, 179]. Although the Corporation endeavored to sell all of its real property in a single sale, it failed to do so [173, 178]. Although the Corporation considered the subdivision and development of the whole Rancho this was never done [139]. In a number of years no sales were made, and in some years only one sale was made [168]. Many sales in acreage were made to persons who, in turn, subdivided and developed and sold the property acquired from the Corporation [160, 168].

None of the acreage parcels sold by the Corporation were improved prior to the sale or for the purposes of sale [95]. The acreage sold was not platted on any

subdivision map prior to sale [147, 171]. At the time of sale in each instance, the parcel sold was thereupon surveyed by metes and bounds and was delineated and described [95, 147]. These sales resulted substantially from the activities of the General Manager, who had a real estate broker's license and who was paid a commission on all sales made by the Corporation [97, 107, 172]. Some sales were made by independent brokers, who were also paid a commission [108]. Interested persons who desired to acquire real property made inquiries of the Corporation [95]. If their offers to purchase were satisfactory, the Corporation would sell such portions as it deemed suitable [170, 171]. No "For Sale" signs were ever authorized to be put on the acreage parcels of the Rancho [95, 172, 173], and there were no real estate offices built or located on the Rancho, other than in the "Rolling Hills" subdivision area [96, 173]. The Corporation employed no outside real estate brokers for the sales of acreage [96]. The property was not listed with independent brokers, and no prices were fixed in advance on the land, except for the proposed single sale of the whole to the United States Government in 1944 [95].

In making such sales of acreage it was the policy of the Corporation to hold the main body of the Rancho intact for a single sale [173]. When, under financial pressure, sales were made of portions of the Rancho around the periphery in so far as possible, in order that such sales would not hurt the proposed ultimate sale of the main body of the Rancho [173]. Except for the Rolling Hills Subdivision, the only improvements which were made by the Corporation in connection with the Rancho, were the installation of certain paved roads for use in connection with its farming operations [95,

162, 163], and the installation of a water system which was used for irrigation purposes in connection with its farming activities [163]. The first time Corporation actually plotted, subdivided, developed and improved for the purposes of sale any portion of the Rancho was in or about the year 1936, and this constituted the Rolling Hills subdivision [106].

Prior to the actual subdivision of this parcel within the meaning of the State and County law, the Corporation sold portions of this Rolling Hills section as acreage for residential purposes [106, 107].

The Corporation had in use a map which it called a "Crop Map" which delineated the arable and tillable portions of the Rancho, and this was used by the Corporation in its farming activities [147, 148]. Approximately 40% of the Rancho, constituting substantially all of the arable and tillable portions of the Rancho, were farmed by the Corporation since 1926 [164]. The Corporation endeavored to make the maximum use of its lands for farming purposes [164].

In the month of July, 1944, the Corporation sold to one Snow an unsubdivided portion of [its] real property in the County of Los Angeles, State of California, for the sum of \$90,000.00, consisting of 422.56 acres [18]. Said real property has a cost base to the Corporation in the sum of \$23,636.93, resulting in a profit or gain of \$66,363.07. During the fiscal year of the Corporation, commencing October 1, 1943, and ending September 30, 1944, the Corporation received from said Snow, on account of said purchase price of \$90,000.00, the sum of \$27,000.00 and elected, pursuant to Sec. 44(b) of the Int. Rev. Code to report, for income tax purposes, said sale upon the installment basis [19].

Said real property sold to Snow was acquired by the Corporation as part of said 12,245 acres of land transferred to the Corporation as of January 1, 1926, in exchange for its common stock [19]. Said real property had been owned and held by the Corporation since said date, to-wit, January 1, 1926 [19].

Said Snow lived in the neighborhood of Rancho Palos Verdes and told an independent broker that he would like some of the land of the Corporation [173, 174]. The broker thereupon came to the General Manager of the Corporation at that time and inquired concerning what land was available for sale [174]. An offer was made to the Corporation which was deemed acceptable by it, and the real property was then sold to Snow [174]. The land which was sold to Snow had been used by the Corporation in connection with its farming and grazing activities [174]. Income was derived from this parcel in the years prior to and during the year of sale [45]. At the time of the sale the tillable portions of said real property were under a crop-sharing lease, dated October 1, 1943, with one Harold M. Thorsen, for a term beginning on that date, and ending September 30, 1944 [175]. The other portions of the parcel which were not suitable for agricultural purposes were in use by the Corporation for sheep grazing and income was being derived by the Corporation for such use [177, 178]. The only improvement on said land was the existing road known as Palos Verdes Drive East, which traversed approximately the center of the parcel [155], which road was put in by the Palos Verdes Syndicate approximately in the year 1924 [164]. Other than the road, the real property was in the same condition as when acquired by the Palos Verdes Syndicate in 1913 and transferred to the Corporation in 1926 [162, 164]. Said land was not part of the Rolling Hills Sub-

division, was not platted or subdivided or delineated prior to the sale [147]. At the time of the sale the Corporation employed a civil engineer to survey and delineate and describe the area sold [147]. The property sold to Snow was later used by him for subdivision purposes [160].

The Corporation caused to be distributed to the public, certain leaflets or brochures describing the land it held [108, 109]; part of these brochures were confined to that section known as Rolling Hills subdivision [109], while other leaflets described the balance of the unsubdivided property of plaintiff known as acreage [Deft. Exs. A, A-1, A-2, A-3, A-4]. Leaflets and brochures relating to the whole Rancho were distributed not earlier than the year 1937 [109]. In one year, 1940, postcards were mailed to the public in Los Angeles, offering to sell land at \$185.00 per acre [114]. These cards referred to certain lands on the northern periphery of the Rancho, which was in the main not arable, but was rough, barren and non-producing, and was substantially untillable and not suitable for the farming activities of the Corporation [143, 144].

Between 1941 and 1944, the Corporation made varied and vigorous efforts to dispose of substantially all of its real estate holdings, to various agencies of the State and Federal Government, and caused to be made a plat showing the area laid out for park purposes [144, 145].

The Corporation sold, during the fiscal year ended September 30, 1944, both subdivided land and unsubdivided portions of the property, and the sales of its unsubdivided portions greatly exceeded in number the subdivision sales [46]. During the fiscal year, ending September 30, 1944, the Corporation in addition to the Snow Sale made 34 other sales of unsubdivided land, totaling 531.850 acres [46], and reported these sales as ordinary income [27].

The Corporation claimed and asserted at the time of the hearing of this action that, in addition to the real property sold to Snow, the other acreage parcels sold during the fiscal year ending September 30, 1944, should be treated as the sales of capital assets; but an error was made and the claim for refund which was filed should have included all of the acreage sales as sales of capital assets [179].

The Corporation, from its inception, derived substantial income from its farm and pasture rentals, crop sales and earth and rock royalties [45, 87]. In the fiscal year ended September 30, 1944, it derived an aggregate income from such sources in the sum of \$138,711.76 [45]. The income derived from farming operations and from rock and earth royalties, however, was insufficient to pay the expenses of the Rancho including the County real estate taxes, and taxes for the years 1935 to 1943 were unpaid at the date of the sale to Snow [92, 93, 94].

All of the real property owned by the Corporation, except the Rolling Hills Subdivision was assessed by the County of Los Angeles and taxed on an acreage basis [156, 157, and Pltf. Ex. 9]. Since the Corporation acquired the Palos Verdes Rancho in 1926 it has never bought any other real estate [178]. During the period of its Corporate history it has only sold its own property and has never acted as a broker or development company for any other person [178]. All sales of acreage were made substantially in the condition in which the land was acquired by the Corporation [179].

During the year 1944 the Board of Directors of the Corporation passed resolutions evidencing the intention of the Corporation to sell approximately all of the remaining acreage of the Corporation [99, 100], and to liquidate and distribute the proceeds from the sale to the stockholders [101, 102, 103, 104].

Question Presented.

The sole question presented is as follows:

Is the gain on the sale of the unsubdivided portions of appellant's real property sold to Snow in the year 1944 taxable as ordinary income to the Corporation under the provisions of the Internal Revenue Code, or as a gain derived from the sale of a capital asset under the provisions of Section 117(a)(10) of the Internal Revenue Code, or as a gain from the sale of real estate used in the trade or business of the Corporation under the provisions of Section 117(j) of the Internal Revenue Code?

It is admitted that the Corporation is in the real estate business with respect to its subdivided property. A subsidiary question is then presented—can the Corporation be in the real estate business with respect to a portion of its real property and be an investor with respect to the remainder of its real property?

The Court, in its Findings of Fact found that the Corporation was engaged in the real estate business, both as to the subdivided and unsubdivided real property and concluded that the parcel of real property sold to Snow was not a capital asset, nor an asset used in the Corporation's trade or business, and that all the real property was held primarily for sale to customers in the ordinary course of its real estate business.

Statutes and Regulations Applicable.

INTERNAL REVENUE CODE:

Sec. 117. Capital Gains and Losses.

“(a) Definitions,—As used in this chapter—

“(1) Capital assets.—The term ‘capital assets’ means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 23(1), or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

“(2) Short-term capital gain.—The term ‘short-term capital gain’ means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing net income;

“(3) Short-term capital loss.—The term ‘short-term capital loss’ means loss from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such loss is taken into account in computing net income;

“(4) Long-term capital gain.—The term ‘long-term capital gain’ means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

“(5) Long-term capital loss.—The term ‘long-term capital loss’ means loss from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such loss is taken into account in computing net income;

“(6) Net short-term capital gain.—The term ‘net short-term capital gain’ means the excess of short-term capital gains for the taxable year over the short-term capital losses for such year;

“(7) Net short-term capital loss.—The term ‘net short-term capital loss’ means the excess of short-term capital losses for the taxable year over the short-term capital gains for such year;

“(8) Net long-term capital gain.—The term ‘net long-term capital gain’ means the excess of long-term capital gains for the taxable year over the long-term capital losses for such year;

“(9) Net long-term capital loss.—The term ‘net long-term capital loss’ means the excess of long-term capital losses for the taxable year over the long-term capital gains for such year.

“(10) Net capital gain.—

“(A) Corporations.—In the case of a corporation, the term ‘net capital gain’ means the excess of the gains from sales or exchanges of capital assets over the losses from such sales or exchanges; and

“(B) Other Taxpayers.—In the case of a taxpayer other than a corporation, the term ‘net capital gain’ means the excess of (i) the sum of the gains

from sales or exchanges of capital assets, plus net income of the taxpayer or \$1,000, whichever is smaller, over (ii) the losses from such sales or exchanges. For purposes of this subparagraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets. If the tax is to be computed under Supplement T, 'net income' as used in this subparagraph shall be read as 'adjusted gross income.'

“(11) Net capital loss—The term 'net capital loss' means the excess of the losses from sales or exchanges of capital assets over the sum allowed under subsection (d). For the purpose of determining losses under this paragraph, amounts which are short-term capital losses under subsection (e)(1) shall be excluded.

“(b) Percentage Taken Into Account.—In the case of a taxpayer other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

“100 per centum if the capital asset has been held for not more than 6 months;

“50 per centum if the capital asset has been held for more than 6 months.”

“* * * * *

INTERNAL REVENUE CODE:

“*Sec. 117. Capital Gains and Losses.*

“* * * * *

“(j) Gains and Losses from Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.—

“(1) Definition of property used in the trade or business.—For the purposes of this subsection, the term ‘property used in the trade or business’ means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k)(1) or (2) is applicable.

“(2) General rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

“(A) In determining under this paragraph whether gains exceed losses, the gains and losses de-

scribed therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

“(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

“* * *

Treasury Regulations 111, Sec. 29.117-1 (as amended by T. D. 5425, Dec. 29, 1944):

“Meaning of terms.—The term ‘capital assets’ includes all classes of property not specifically excluded by section 117(a)(1). In determining whether property is a ‘capital asset’, the period for which held is immaterial.

“The exclusion from the term ‘capital assets’ of property used in the trade or business of a taxpayer of a character which is subject to the allowance for depreciation provided in section 23(1) and of real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. Gains and losses from the sale or exchange of such property are not subject to the percentage provisions of section 117(b) and losses from such transactions are not subject to the limitations on losses provided in section 117(d), except that under section 117(j) the gains and losses from the sale or exchange of such property held for more than 6 months may be treated as gains and losses from the sale or exchange of capital assets, and may thus be subject to such limitations. See section 29.117-

7. Property held for the production of income, but not used in a trade or business of the taxpayer, is not excluded from the term 'capital assets' even though depreciation may have been allowed with respect to such property under section 23(1) prior to its amendment by the Revenue Act of 1942. However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business, as in the case of a dealer in real estate, is not subject to the limitations of section 117(b), (c) and (d). The term 'ordinary net income' as used in these regulations for the purposes of section 117 means net income exclusive of gains and losses from the sale or exchange of capital assets.

“* * *

“In the definition of 'net short-term capital gain', as provided in section 117(a)(6), the amounts brought forward to the taxable year under section 117(e) are short-term capital losses for such taxable year.

“Gains and losses from the sale or exchange of capital assets held for not more than six months (described as short-term capital gains and short-term capital losses) shall be segregated from the gains and losses arising from the sales or exchanges of such assets held for more than six months (described as long-term capital gains and long-term capital losses). The percentage brackets of section 117(b) have no application to corporations, corporate gains and losses being taken into account to the full extent, without regard to the length of time the capital assets are held

(though because of the limitations in section 117(d) such losses may not be deductible in full).

“Section 117(a)(10) defines ‘net capital gain’. In the case of a corporation the term ‘net capital gain’ means the excess of the gains from sales or exchanges of capital assets over the losses from such sales or exchanges which losses include any amounts brought forward under section 117(e). In the case of a taxpayer other than a corporation the term ‘net capital gain’ means the excess of (1) the sum of the gains from sales or exchanges of capital assets, plus net income (computed without regard to gains and losses from sales or exchanges of capital assets) of the taxpayer or \$1,000, whichever is smaller, over (2) the losses from such sales or exchanges, which losses include amounts brought forward under section 117(e). For taxable years beginning after December 31, 1943, in the case of a taxpayer whose tax liability is computed under Supplement T, the term ‘net income’, as used in the preceding sentence, shall be read as ‘adjusted gross income’. In the determination of adjusted gross income (prior to the determination of ‘net capital gain’) there shall be taken into account the same percentages of the gain or loss as are taken into account in computing net income. For application of the term ‘net capital gain’, in computing the capital loss carry-over under section 117(e), see section 29.117-2(c).

“Section 117(a)(11) defines ‘net capital loss’ to mean the excess of the losses from sales or exchanges of capital assets over the sum allowed under section

117(d). However, amounts which are short-term capital losses under section 117(e)(1) are excluded in determining such 'net capital loss'.

“* * *”

Treasury Regulations 111, Sec. 29.117-2 (as amended by T.D. 5425, Dec. 29, 1944).

“Percentage of capital gain or loss taken into account: Net loss carry-over.—(a). General.—In computing the net income of a taxpayer, other than a corporation, the amount of the gain or loss, computed under Section 111 and recognized under Section 112, upon the sale or exchange of a capital asset shall be taken into account only to the extent provided in Section 117(b). The percentage of the gain or loss to be taken into account ranges from 100 percent to 50 percent, depending upon the period for which the asset was held. For instance, if unimproved real estate purchased by an individual for \$20,000 is a capital asset and is sold by him for \$25,000 after having been held for more than six months, only 50 percent of the recognized gain (\$5,000), or \$2,500, shall be taken into account in computing net income; or if such property is sold for \$14,000, only 50 percent of the recognized loss (\$6,000), or \$3,000, shall be so taken into account.

“(b) Limitation on Capital Losses.—Section 117(d)(1) provides that, in the case of a corporation, losses from sales or exchanges of capital assets shall be allowed as deductions only to the extent of the gains from such sales or exchanges, and section 117

(d)(2) provides that, in the case of a taxpayer other than a corporation, losses from sales or exchanges of capital assets shall be allowed as a deduction only to the extent of the gains from such sales or exchanges, plus net income (computed without regard to such gains or losses) of the taxpayer or \$1,000, whichever is smaller. Thus, where an individual taxpayer, having an ordinary net income of \$5,000, has a net long-term capital loss of \$4,000, of which \$2,000 (50% of \$4,000) is taken into account, the net loss of \$2,000 is allowable only to the extent of \$1,000, the remaining \$1,000 being an unallowable deduction. If the taxpayer's ordinary net income, computed without capital gains and losses, had been \$400 instead of \$5,000, only \$400 of the net loss of \$2,000 would have been allowed, giving the taxpayer no taxable income and an unallowable capital loss of \$1,600. (For disposition of the unallowable capital loss, see subsection (c) of this section.) However, in the case of banks, as defined in section 104, the limitation under section 117(d)(1) is modified by section 117(i) so that the excess of any losses of the taxable year from sales or exchanges of bonds, debentures, notes or certificates, or other evidence of indebtedness issued by any corporation (including one issued by a government or political subdivision thereof) with interest coupons or in registered form, over gains of the taxable year from such sales or exchanges may be deductible in full as an ordinary loss. In case the tax is computed under Supplement T, the term 'net income' shall, for taxable years beginning after

December 31, 1943, be read as 'adjusted gross income.'

“* * *.”

Treasury Regulations 111, Sec. 29-117-7 (as amended by T. D. 5394, July 27, 1944).

“Gains and losses from involuntary conversions and from the sale or exchange of certain property used in the trade or business.—Section 117(j) provides that the recognized gains and losses

“(a) From the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is

“(1) of a character subject to the allowance for depreciation provided in section 23(1), or

“(2) real property,
provided that such property is not of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business and

“(b) from the involuntary conversion of capital assets held for more than six months, and

“(c) from timber held for more than six months which is considered to have been sold under the provisions of section 117(k)(2), and with respect to taxable years beginning after December 31, 1943, from timber owned or held

under a contract right to cut for more than six months prior to the beginning of the taxable year which is considered to have been sold or exchanged under the provisions of section 117 (k)(1), regardless of whether such timber would be properly includible in the inventory of the taxpayer if on hand at the close of the taxable year or whether such timber was held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business,

shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. If the aggregate of such gains does not exceed the aggregate of such losses, such gains and losses shall not be treated as gains and losses from the sale or exchange of capital assets.

“In determining whether such gains exceed such losses for the purposes of section 117(j), losses upon the destruction in whole or in part, theft or seizure, requisition or condemnation of the property described in section 117(j) are included whether or not there was a conversion of such property into money or other property. For example, if a capital asset held for more than 6 months, with an adjusted basis of \$400, is stolen, and the loss from this theft is not compensated for by insurance or otherwise, the \$400 loss is included in the computations under section 117(j) to determine whether gains exceed losses. Furthermore, in making this computation, the gains and losses described in section 117(j) are taken into account without regard to the percentage provisions of section 117(b), that is, 100 percent of such gains and losses is taken into account. For example, if a taxpayer sustains a loss of \$400 upon the sale under

threat of condemnation of a capital asset, held for more than 6 months, such loss is taken into account for the purposes of section 117(j) to the extent of \$400, even though only \$200 would be taken into account under section 117(b) in computing net income. Similarly, the provisions of section 117(d) limiting the deduction of capital losses are not applicable to exclude any losses from the computations under section 117(j). With these exceptions as to sections 117(b) and 117(d), gains and losses are included in the computations under section 117(j) only to the extent that they are taken into account in computing net income. Thus, losses which are not deductible items under section 24 or section 118 are not included in the computations under section 117(j). Similarly, if a taxpayer reports on the installment basis under section 44 the gain on the sale of property described in section 117(j), only the portion of the gain reported under section 44 in computing net income for the taxable year is included in the computations for such taxable year under section 117(j). Any gains and losses which are not recognized under section 112 are not included in the computations under section 117(j). Thus, if property is involuntarily converted into similar property, so that the gain on such conversion is not recognized under the provisions of section 112(f), such gain is not included in the computations under section 117(j).

“If it is determined under the above computations that the gains exceed the losses, all of such gains and losses are treated as gains and losses from the sale or exchange of capital assets held for more than 6 months. All such gains and losses are then subject to the limitations of section 117(b), (c), and (d), relating to the percentage taken into account, the alternative tax in the case of capital gains and losses,

and the extent to which capital losses are allowed. If it is determined under the above computations that the gains do not exceed the losses, none of such gains and losses are treated as gains and losses from the sale or exchange of capital assets. Such gains and losses are then not subject to the percentage limitations of section 117(b), and such losses are not subject to the limitations provided in section 117(d). For example, if the taxpayer during the taxable year has losses of \$1,000 on the sale of certain depreciable machinery used in his trade or business, held for more than 6 months, and a gain of \$400 on the sale under threat of condemnation of a capital asset held for more than 6 months, such losses exceed such gain, and such losses and gain are not treated as losses and gain from the sale or exchange of capital assets. The gain on the sale of the capital asset would therefore be taken into account in full, instead of to the extent of 50 percent as provided in section 117(b).

“Section 117(j) does not apply to gains and losses on the sale, exchange, or involuntary conversion of any property which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or which is held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, but not including as such property timber which is considered to have been sold or exchanged as provided in section 117(k)(1), or which has been sold as provided in section 117(k)(2). The involuntary conversion of property described in section 117(j) is the conversion of such property into money or other property as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof.

Specification of Errors

ARTICLE I.

The findings that plaintiff was engaged in the real estate business in so far as they relate to its farm acreage and to the sales of its unsubdivided portions of its real property contained in Article XXIV of Findings of Fact [68], and that the plaintiff was continuously engaged in the sale thereof, contained in Article XXV of the Findings of Fact [68], were erroneous in that the evidence as a whole shows that said unsubdivided portions of the real property were held primarily as an investment, and for the production of income; that such sales as were made were in the orderly liquidation of the investment, and were not made in the ordinary course of the trade or business of real estate.

ARTICLE II.

The Conclusions of Law that the parcel sold to one Snow in July, 1944, was not a capital asset, nor a capital asset used in plaintiff's trade or business, contained in Article II of Conclusions of Law [68] were erroneous in that the evidence shows that said parcel was held as an investment [19] and for the production of income and, at the time of the sale, was used in the trade or business of farming and grazing [173, 174, 175, 176] by plaintiff and was not held *primarily* for sale in the ordinary course of trade or business of real estate.

ARTICLE III.

The findings that all sales of unsubdivided real property were subject to restrictions in the Deed preventing use of the property except for residential purposes contained in Article XVIII of the Findings of Fact [67] were erroneous in that the evidence shows that many of the sales of plaintiff's lands were for governmental [153,

154], commercial and business use [170, 171], and that no restrictions were placed in such deeds and only restrictions were placed in sales restricting the use for residential purposes where the same were deemed appropriate [181]. No such restrictions were placed in the deed to Snow [46 to 59, incl.].

ARTICLE IV.

The Findings that although plaintiff made 34 additional sales of unsubdivided property in the fiscal year ending September 30, 1944, which were reported as ordinary income it has not, at any time, contended that this acreage represented a capital asset contained in Article XXIX of the Findings of Fact [67] were erroneous in that the evidence shows that the plaintiff, at the time of the action, considered all sales of acreage and unsubdivided portions of its real property as the sales of capital assets and that an error was made in not including such sales in addition to the Snow sale in its claim for refund [179].

ARTICLE V.

The Conclusions of Law that plaintiff advertised all of its property for sale to the general public contained in Article I of the Conclusions of Law [68] were erroneous in that the evidence shows that the brochures and pamphlets issued by the plaintiff were primarily applicable to the Rolling Hills Subdivision and they only constituted general historical background and publicity with respect to the Palos Verdes Rancho which included the unsubdivided portions of its real property [Deft. Exs. A, A-1, A-2, A-3, A-4]; that only one sporadic effort of general public solicitation was shown in the year 1940 [114], and that there was no evidence of advertisement to the public in the accepted sense of real estate business advertising of its real property during the course of its corporate history.

Summary of Arguments.

The Rancho Palos Verdes, a working ranch, was acquired and held for a long period of time as an investment and for the production of income and is properly classifiable as a capital asset under the provisions of Section 117, Internal Revenue Code.

In order to stimulate the sales of farms, mineral properties and other capital assets Congress enacted the relief provisions contained in Section 117, Internal Revenue Code to permit such transactions to take place without fear of prohibitive tax otherwise resulting from the realization in one year of gains and profits earned over a period of time.

The Corporation's purpose was not to engage in the real estate business, but to liquidate its assets and distribute the proceeds thereof to its stockholders as soon as possible. The liquidation proceeded slowly by reason of factors beyond the control of the Corporation, but was done in the most orderly manner and method possible. The course of conduct of the Corporation towards its unsubdivided parcels embraced nothing more than activities incidental to an orderly liquidation thereof.

Forced by economic necessity the Corporation went into the real estate business in 1936 as to a small portion of its real property which became known as the "Rolling Hills" development, but continued its policy of liquidation with respect to the remaining portions thereof. From such time on it acted in a dual capacity, *i. e.*, as a dealer as to its improved, subdivided, and developed portions and as an investor with respect to the remainder. The remainder, portions of which included the real property sold to Snow in the year 1944, was farmed, mined, and grazed for the production of income by the Corporation as an investor.

ARGUMENTS.

I.

Rancho Palos Verdes Was Acquired Originally as an Investment, a Capital Asset for the Production of Income, and in This Status the Corporation Acquired and Held the Real Property Herein Involved.

Although the record is unsatisfactory as to the subjective intent of the members of the Palos Verdes Syndicate upon acquisition of the Rancho Palos Verdes in 1913, as all of the members of the Syndicate were deceased at the time of the trial, except one, who was very aged and outside of the State of California [79, 80], the objective facts as to what the Syndicate did with the real property and what the Corporation did with this real property clearly show that the acquisition was for the purpose of investment, and not for the purpose of engaging in the development and sale of real property. It appears that the Syndicate held title to the real property for some ten (10) years before any sale was made, during which time it appointed a General Manager and engaged solely in farming activities [63, 64]. The Syndicate entered into a contract for the sale of the whole Rancho in the condition in which it was acquired in 1923 [83].

Holding an asset for many years indicates an intention to hold for investment rather than for sale. (*The Merchants National Bank of Mobile v. Commissioner* (1950), 14 T. C. 1375, 1379.)

The long period of holding assets without being disposed of violates the concept of an organized business with respect thereto. (*Mackall v. Commissioner* (1944).

3 T. C. M. 701; *Loewenberg v. Commissioner* (1948),
7 T. C. M. 702)

After failure to consummate the sale of the whole Rancho, the real property was transferred to the Corporation by the Syndicate as a more convenient vehicle for holding title in exchange for the issuance of stock [18]. The reasons for the formation of the Corporation were as stated by the Chairman of the Board of Directors of the Palos Verdes Corporation in answer to the question "Could you tell me the reasons for the formation of the Corporation at that time?" Answer "Well, as I knew them, they were that the property had been held by a Syndicate which was a very loose form particularly as to the administration of the property and, in the meantime, since the Syndicate had been formed, one or more of the original Syndicate members had died; whereupon estates were involved in the administration, and it had seemed to me at that time, and in which Mr. Vanderlip concurred and approved, that the matters should be incorporated for the usual purposes of incorporating a matter of that kind" [85, 86].

Not until approximately 1936, ten (10) years after acquisition by the Corporation, was any portion of the real property subdivided, developed and sold in a real estate business sense, and at that time only a relatively small portion of the Palos Verdes Rancho (approximately 600 acres) was subdivided and developed and became known as the "Rolling Hills" development [92, 93]. This subdivision was the result of a desire upon the part of the Corporation to take some rough and unproductive land not suitable for farming off the tax roll and to produce some funds to enable the Corporation to continue to hold the Rancho through the depression [93].

The parcel of real property sold to Snow was held by the Corporation for eighteen and one-half ($18\frac{1}{2}$) years before sale [18, 19].

A hope when a purchase of real property is made, that the property may, at some future time, be sold at a profit, will not transmute a long time investment in land into the business of buying and selling real estate, or change a capital transaction into an ordinary profit or loss. (*Harris v. Commissioner* (1944), 143 F. 2d 279.)

II.

The Intent of Congress in Enacting the Relief Provisions Provided in Section 117 Internal Revenue Code Is Thwarted, Negated and Rendered Meaningless by the Commissioner's Treatment of the Gains Derived From the Sales of Farm Acreage by the Corporation as Ordinary Gains. The Commissioner Has Erroneously Treated the Gain Resulting From the Snow Sale as All Having Occurred in the Year 1944, Whereas the Appreciation in Value Occurred Over a Long Period of the Holding of the Asset and Cannot Be Reasonably Attributed to Any One Year, or to the Corporation Activities With Respect to the Land.

Prior to 1921, the sale and exchange of property was treated, with respect to gains and losses, without differentiation from gains and losses incurred in connection with the business in general. The original step in limiting the taxation of gains resulting over a long period of time was contained in Section 206(b) of the Revenue Act of 1921. The purpose of the capital gains provisions embodied in such Act was set forth in House Report No. 350, 67th Cong., 1st Sess., as follows:

CAPITAL GAIN AND CAPITAL LOSS.

Section 206: The sale of farms, mineral properties, and other capital assets is now seriously retarded by the fact that gains and profits earned over a series of years are under the present law taxed as a lump sum (and the amount of surtax greatly enhanced thereby) in the year in which the profit is realized. Many such sales, with their possible profit taking and consequent increase of the tax revenue, have been blocked by this feature of the present law. In order to permit such transactions to go forward without fear of a prohibitive tax, the proposed bill, in section 206, adds a new section (207) to the income tax, providing that where the net gain derived from the sale or other disposition of capital assets would under the ordinary procedure, be subjected to an income tax in excess of 15 per cent, the tax upon capital net gain shall be limited to that rate. It is believed that the passage of this provision would materially increase the revenue, not only because it would stimulate profit-taking transactions but because the limitation of 15 per cent is also applied to capital losses. Under present conditions they are likely to be more losses than gains.

Also in Senate Report No. 275, 67th Cong., 1st Sess., as follows:

CAPITAL GAIN AND CAPITAL LOSS.

Section 206 limits the rate of taxation upon gain derived from the sale of capital assets. Under the present law many sales of farms, mineral properties, and other capital assets have been prevented by the fact that gains and profits earned over a series of years are under the present law taxed as a lump sum and the amount of surtax excessively enhanced thereby. In order to permit such

transactions to take place without fear of prohibitive tax, Section 206 provides that only 40 per cent of the net gain derived from the sale or other disposition of capital assets shall be taken into account in determining the net income upon which the income tax is imposed. This automatically reduces the rate of taxes applicable to such income by 60 per cent. The maximum rate (normal and surtax) upon ordinary income after January 1, 1922, will be 40 per cent, and the maximum rate applicable to capital net gain will be 16 per cent. The house bill placed a similar limitation upon both capital gains and losses, but this limitation was not applicable to corporations nor to certain classes of taxpayers having net income less than \$29,000. The senate provision would permit a taxpayer to deduct the entire loss sustained in a capital transaction and is applicable to all classes of taxpayers. In Great Britain capital gain or loss is ignored or eliminated in computing the net income. Section 206 takes an intermediate position between the extreme views embodied, respectively, in the present American and British laws.

Judicial recognition of this purpose is set forth in the case of *Burnet v. Harmel* (1932), 53 S. Ct. 74, 287 U. S. 103, 77 L. Ed. 199, where the Court on pages 202-203 of L. Ed. said:

“Before the Act of 1921, gains realized from the sale of property were taxed at the same rates as other income, with the result that capital gains, often accruing over long periods of time, were taxed in the year of realization at the high rates resulting from their inclusion in the higher surtax brackets. The provisions of the 1921 Revenue Act for taxing capital gains at a lower rate, reenacted in 1924 with-

out material change, were adopted to relieve the taxpayer from these excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions. House Report No. 350, Ways and Means Committee, 67th Cong., 1st Sess. on the Revenue Bill of 1921, P. 10; see *Alexander v. King* (C. C. A. 10th), 74 A. L. R. 174, 46 F. 2d 235."

Again in 1940, in the case of *Kenan, Jr. v. Commissioner of Internal Revenue* (1940), 114 F. 2d 217, the same purpose is alluded to in the opinion of the Court at page 220 as follows:

"(4) The purpose of the capital gains provisions of the Revenue Act of 1934 is so to treat an appreciation in value, arising over a period of years but realized in one year, that the tax thereon will roughly approximate what it would have been had a tax been paid each year upon the appreciation in value for that year. Cf. *Burnet v. Harmel*, 287 U. S. 103, 106, 53 S. Ct. 74, 77 L. Ed. 199. The appreciation in value in the present case took place between 1917 and 1935, whereas the Commissioner's theory would tax it as though it had all taken place in 1935."

See also:

Commissioner v. Shapiro (1942), 125 F. 2d 532.

In 1942, subsection (a), paragraphs (10 and 11), were added to Section 117 of the Internal Revenue Code, Act of 1942 (Act of October 21, 1942, C. 619, Stat. 798), Section 150 thereof, making the capital gain provisions thereof applicable to Corporations.

III.

The Primary Purpose of the Corporation in Holding the Rancho Palos Verdes Was to Liquidate It and, During Liquidation, Derive Income From Its Farming Activities, Not to Engage in the Business of Development, and of Buying and Selling Real Property.

It is well established that a casual sale of real estate held for an investment results in a capital gain or loss (*Phlipps v. Commissioner* (1931), 54 F. 2d 469; *Snell v. Commissioner* (1938), 97 F. 2d 891; *Fahs v. Crawford* (1947), 161 F. 2d 315.)

Merely disposing of investment assets at intermittent intervals, without more, is not engaging in business, even though some preliminary effort is necessary to render the asset saleable. (*Fahs v. Crawford* (1947), 161 F. 2d 315; *White v. Commissioner* (1949), 172 F. 2d 629.)

The Corporation, from its inception, endeavored to sell the whole of its real property in the condition in which it acquired it from the Palos Verdes Syndicate [97, 143, 145, 179]. Its purpose was to liquidate its holdings and not to engage in the active conduct of a business. This purpose is formally exemplified in the year of the Snow sale, by the Resolutions of the Board of Directors of the Corporation contained in their Minutes of January 24, 1944 [99, 100], and July 31, 1944 [101, 102, 103, 104], authorizing the sale of all or substantially all of the property of the Corporation, and providing for the distribution in liquidation of the proceeds pro rata to the stockholders as their interests appear.

The efforts of the Corporation to sell its real property in the condition in which it acquired it, is not a trade or

business within the intendment of the tax statute. (*Crocker v. Helvering* (1937), 91 F. 2d 299.)

The statute requires that in order to constitute a business, the property must not only have been held "primarily for sale" but also "for sale in the ordinary course of business of the taxpayer." (*Dunlap v. Oldham Lumber Co.* (1950), 178 F. 2d 781; 117(a)(1), Int. Rev. Code, Reg. 111, Sec. 29.117-1.)

The activities of the Corporation with respect to its unsubdivided acreage embraced nothing more than activities incidental to an orderly liquidation. (*Three States Lumber Co. v. Commissioner* (1946), 158 F. 2d 61.)

The sales of the Corporation's lands in acreage parcels were in an endeavor to get rid of capital assets which were not profitable to farm and produce further income, in view of the rising tax burden and the change of economic conditions in Southern California.

The liquidation progressed slowly not only because of the physical condition of the land and its enormous quantity, but because the demand for such real property encountered in the nationwide depression was very small. Until 1941, the sales were irregular, infrequent and lacking in continuity [168]. The increased sales of acreage parcels which occurred commencing with the year 1941, were the result of the increased demand for real property following the depression, and were not the results of real estate business activities of the Corporation. The Court will take judicial notice of a general rise or depression of real estate values as are a public concern which are known to all well-informed persons. (*Sleeper v. Zeiter*, 178 Minn. 622, 227 N. W. 662; *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 290, 54 S.

Ct. 647; *Camerer v. California Bank*, 4 Cal. 2d 159, 48 P. 2d 39, 100 A. L. R. 667.)

During its entire corporate history, the Corporation bought no real property [178]. It merely tried to liquidate its holdings, selling first its fringe acres [173] and its unproductive lands [93] and endeavoring to hold the main body of the Ranch intact for a single sale [173] in liquidation.

IV.

The Course of Conduct of the Corporation with Respect to Its Acreage Land Did Not Establish Any Ordinary Course of Business, Such as Is Required Under the Tests Laid Down by the Courts to Convert Property Held for Investment Purposes and for the Production of Income, to Property Held Primarily for Sale in the Ordinary Course of Trade or Business.

Thrift, Sr. v. Commissioner, 15 T. C. 366.

See also:

Dunlap v. Oldham Lumber Co., 178 F. 2d 781;

U. S. v. Robinson, 129 F. 2d 297.

The Courts have pointed out that there is no one decisive test to determine whether real estate is held primarily for sale to customers in the ordinary course of business, or whether it is to be considered as a capital asset. The solution must depend upon all of the pertinent facts. Thus in the case of *Guthrie v. Jones* (1947), 72 Fed. Sup. 784, at p. 785, the Court said as follows:

“A. The issue is whether the profits received from the sale of the taxpayer’s lots were, under the

facts found, a sale of capital assets, only one-half of which profit may be subjected to income tax, or whether the profits from such sales arose from the sale of property held primarily for sale to customers in the ordinary course of the taxpayer's trade or business in which event the whole of the gain is subject to income tax as ordinary income. 26 U. S. C. A., Int. Rev. Code, Sec. 117. The issue is one of fact. *Reynolds v. Commissioner* 1 Cir., 155 F. 2d 620; *Van Suetendacl v. Commissioner*, 2 Cir., 152 F. 2d 654; *Estate of Kleberg v. Commissioner*, 7 T. C. 1488; and see *Higgins v. Commissioner*, 312 U. S. 212, 61 S. Ct. 475, 85 L. Ed. 783; *Fuld v. Commissioner*, 2 Cir., 139 F. 2d 465.

(3) The existence of certain circumstances such as the regularity and continuity of sales (*Higgins v. Commissioner*, *supra*; *Broten v. Commissioner*, 5 Cir., 143 F. 2d 468), the nature of the acquisition of the property or purpose of acquisition (*Kanawha Valley Bank v. Commissioner*, 4 T. C. 252; *Thompson Lumber Co. v. Commissioner*, 43 B. T. A. 726; *Jones v. Commissioner*, 1 T. C. 1214; *Three States Lumber Co. v. Commissioner*, 7 Cir., 158 F. 2d 61, reversing 5 T. C. 1391), the nature and extent of taxpayer's 'Business' (*Flint v. Stone Tracy Co.*, 220 U. S. 107, 171, 318 (S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312) the activity of the taxpayer in promoting the sales (*Haden v. Commissioner*, 2 T. C. 1268; *Oliver v. Commissioner*, 1 T. C. 1215, affirmed 4 Cir. 138 F. 2d 910; *Swanston v. Commissioner*, 1 T. C. 1216), and other circumstances are the factors to be considered in arriving at a decision. No one of these facts is decisive but the solution must depend upon all the pertinent facts and their relative importance in each case."

It is to be noted in the above case that the taxpayer acquired by foreclosure a platted and subdivided addition to Oklahoma City in 1932. Until 1940, taxpayer made only a casual sale of a lot with the addition. Sales increased during the period of 1940 to 1943. There were 100 transactions from 1940 to 1942, 70 of which were unsolicited purchases made in 1940 and 1941, 24 sales for 1942, and 6 in which the sale was never completed. There were 113 transactions for 1943. There were 84 sales of lots for the tax years involved (1942-1943). Nevertheless, the Court held that the taxpayer's business was loans and investments, and not the real estate business; the property was acquired incident to the default of a loan; the sale of the lots acquired was made to regain the amount of the loan; the taxpayer was inactive and passive in the sales; the sales were irregular and lacking in continuity for eight (8) years; the bulk of the sales were due to the growth of the community and to changes in economic conditions; and the lots were not held primarily for sale; it followed that the profit from the sales were held to be long term capital gains, as distinguished from ordinary gains.

Ordinarily, in determining whether real estate is held for sale to customers, the most important test is whether the sales were frequent, or isolated and casual. (*Boomer v. U. S.* (1947), 74 Fed. Sup. 997; *Trapp v. U. S.* (1948), 79 Fed. Sup. 320.)

In the following leading cases on the subject, great emphasis was placed upon the frequency and continuity of sales. (*Ehrman v. Commissioner* (1941, 120 F. 2d 607; *Brozen v. Commissioner* (1944), 143 F. 2d 468; *Richards v. Commissioner* (1936), 81 F. 2d 369; *Snell*

v. Commissioner (1938), 97 F. 2d 891; *White v. Commissioner* (1949), 172 F. 2d 629; *Field v. Commissioner* (1949), 8 T. C. M. 170; *Oliver v. Commissioner* (1943), 138 F. 2d 910.)

The Frequency and Continuity Test Does Not Apply, However, When the Elements of Development and Substantial Sales Activity Are Lacking, and the Taxpayer Merely Accepts Satisfactory Offers From Unsolicited Purchasers.

Phipps v. Commissioner (1931), 54 F. 2d 469;
Frieda J. Farley v. Commissioner (1948), 7 T. C. 198;
Estate of Alice G. Kleberg (1946), 5 T. C. M. 858;
Claude M. Ferguson v. Commissioner (1950), 9 T. C. M. 243.

The quantum of sales must be viewed in the light of other circumstances. (*W. M. Foster v. Commissioner* (1943), 2 T. C. M. 595.)

Although the liquidation of investment test has been rejected in cases where the manner of conducting the alleged liquidation was such as to constitute a trade or business itself, see *Ehrman v. Commissioner* (1941), 120 F. 2d 607, and *Gruver v. Commissioner* (1944), 142 F. 2d 363, where the elements of development and sales activity are absent, the fact of liquidation is not to be disregarded.

(*White v. Commissioner* (1949), 172 F. 2d 629; *Frieda J. Farley v. Commissioner* (1948), 7 T. C. 198; *Viggo Gruy v. Commissioner* (1950), 9 T. C. M. 235.) In such instances, the purpose of acquisition is an important

factor to be regarded. (*R. H. Hutchinson v. Commissioner* (1949), 8 T. C. M. 597; *Ashton C. Jones, Jr. v. Commissioner* (1943), 1 T. C. M. 816; *William R. Watson v. Commissioner* (1947), 6 T. C. M. 772; *Donald J. Powers v. Commissioner* (1941), Par. 41,498 P. H. Memo. T. C.; *Roy L. Self v. Commissioner* (1950), 9 T. C. M. 421.)

There is a line to be drawn between those who take the position of passive investors, doing only what is necessary from an investment point of view, and those who associate themselves actively in enterprises in which they are financially interested, and devote a substantial part of their time to that work as a matter of business. (*Fahs v. Crawford* (1947), 161 F. 2d 315; *Kane v. Commissioner* (1938), 100 F. 2d 382.)

The following evidentiary matter discloses the passivity and lack of real estate sales activity with respect to the acreage parcels:

(1) No "For Sale" signs were placed on portions of the Rancho outside the Rolling Hills project [95, 172].

(2) Property not listed with outside brokers [95].

(3) Except in connection with the sale of the whole remaining portions of the Rancho in 1944, no prices were ever fixed in advance on acreage parcels [95].

(4) Sales were made upon inquiries of purchasers [95].

(5) No improvements made upon acreage parcels prior to sale [95].

(6) No real estate offices on acreage parcels [96, 173].

(7) No real estate brokers employed in connection with the sales of acreage [96].

(8) No portions of the Rancho were platted out for subdivision purposes or improvements made in connection with the sales [142, 171, 172].

(9) Irregularity and lack of continuity of sales [168]. In a number of years no sales were made [168]. During a number of years only a single sale was made [168].

(10) No continuous activity of buying and selling real property [170].

V.

The Fact That the Corporation Operated Under a Charter That Gave It the Power to Act as a Dealer, Broker or Speculator in Real Estate, Did Not Preclude Its Holding Land for Investment and the Production of Income.

In the case of *Loughborough Development Corporation v. Commissioner* (1933), 29 B. T. A. 95, at p. 98, the Court stated as follows:

“The fact that the petitioner operated under a charter that gave it the power to act as a dealer, broker or speculator in real estate, in our opinion, did not prevent it from acquiring and holding real estate ‘for investment’ and not ‘primarily for sale,’ although such property may have been acquired with the intention of selling or disposing of the same

at some subsequent, though not early, date and would not otherwise have been acquired.”

See also:

Winter Holding Corporation v. Commissioner
(1935), 31 B. T. A. 1185.

The Bureau of Internal Revenue has long recognized that a real estate dealer may also be a real estate investor. See I. T. 2297, C. B. v-2 (1926), p. 109, at page 10 as follows:

“It is evident that the real property regularly bought and sold by a real estate dealer is property held primarily for sale. By the express provisions of section 208(a) 8 of the Revenue Act of 1924, such property could not become capital assets even if held by the taxpayer for more than two years.

“However, if a dealer can establish that any of the property sold by him was held primarily for investment rather than for sale, the provisions of section 206(b) of the Revenue Act of 1921 and section 208(b) of the Revenue Act of 1924 will apply to the taxation of the profits realized from the sale thereof.”

See also:

I. T. 2555, C. B. X-1, p. 306 (1931).

The difficulty is that in practice the Bureau of Internal Revenue is rarely convinced that the taxpayer is acting in the dual capacity. The problem is not unique to real estate. The Bureau has faced it squarely in the case

of security dealers—in fact, has held that security dealers could also invest in securities and obtain a capital gain on sale. I. T. 2502, C. B. VIII-2 (1929), p. 128; I. T. 3828, C. B. 2 (1946), p. 68. See also *Van Suetendael v. Commissioner* (1945), 152 F. 2d 654. Recently the Court found and ruled that the investment securities could even be of the same type or nature as those ordinarily sold to the dealers' customers. I. T. 3891, C. B. 1 (1948), p. 69.

The Courts also have held that a taxpayer may hold certain property for sale to customers in the ordinary course of business, and other property of a similar character as an investment. (*Farry v. Commissioner* (1949), 13 T. C. 8; *Ashton C. Jones, Jr. v. Commissioner* (1943), 1 T. C. M. 816; *George J. Wibbelsman v. Commissioner* (1949), 12 T. C. 1022; *Vaughan v. Commissioner* (1936), 85 F. 2d 497; *Fuld v. Commissioner* (1941), 44 B. T. A. 1268; *Stamler v. Commissioner* (1944), 145 F. 2d 37; *E. Everett Van Tuyl v. Commissioner* (1949), 12 T. C. 900; *Hammitt v. Commissioner* (1935), 79 F. 2d 494; *Francis Shelton Farr v. Commissioner* (1941), 44 B. T. A. 683; *R. O. Holton & Co. v. Commissioner* (1941), 44 B. T. A. 202.)

In the following cases, a distinction has been made between the sales of subdivided lands, which were treated as ordinary gains, and the sales of unsubdivided lands, both held by the taxpayer, which are treated as capital gains. (*J. O. Chapman v. Commissioner* (1944), 3 T. C. M. 604; *Alexander Weil v. Commissioner* (1944), T. C. M. 528.)

VI.

The Parcel of Real Property Sold to Snow During the Fiscal Year Ending September 30, 1944, Is Also Properly Classified as a Section 117(j) Asset.

See 28 U. S. C. A., Sec. 117(j), and Regulation 111, Sec. 29.17-7 as amended by T. D. 5394, July 27, 1944.

The parcel sold to Snow was used by the Corporation prior to and at the time of the sale in connection with its farming activities [174, 175, 176, 177, 178]. At the time of the sale to Snow it was actually under lease as to the tillable areas [175], and was in use for the production of income as to the non-tillable areas for grazing [177, 178].

Although for the purposes of this action it makes no difference whether the real property sold to Snow is classified as a "capital asset" within the meaning of Section 117(a) I. R. C., or an asset used in taxpayer's trade or business, within the meaning of Section 117(j) I. R. C. (in both instances any gains derived from the sale thereof is a capital gain and limited to a tax of twenty-five per cent (25%) this real property can be properly classified as real property used in taxpayer's trade or business of leasing and farming. (*Fackler v. Commissioner of Internal Revenue* (1943), 133 F. 2d 509.)

Following the *Fackler* case, a long line of decisions of the Tax Court, some of them acquiesced in or conceded by the Commissioner, has followed the rule that ownership of any income producing real property is a trade or business within the meaning of Section 117, even though taxpayer is engaged in some other business upon a full time basis and devotes a negligible amount of attention to the real property. The rule above mentioned has been applied to property purchased for an investment. (*Wright*,

Jr. v. Commissioner (1947), 9 T. C. 173; *Jamison v. Commissioner* (1947), 8 T. C. 173; *McKean v. Commissioner* (1946), 6 T. C. 757; *Hazard v. Commissioner* (1946), 7 T. C. 372. See also, *Claude M. Ferguson v. Commissioner* (1950), 9 T. C. M. 243; *Farry v. Commissioner* (1946), 13 T. C. 8; *Harris v. Commissioner* (1941), 44 B. T. A. 999; *Ben L. Carroll v. Commissioner* (1930), 21 B. T. A. 724.)

Conclusion.

The long period of holding of the real property sold to Snow and its use for the production of farm income without being disposed of and without subdivision, development or improvement, violates the concept of an organized real estate business with respect thereto. The appreciation in value of such asset cannot reasonably be attributed to any one particular year, or to the activities of the taxpayer with respect thereto, but can only be attributed to the growth, development and the change in economic conditions in Southern California which took place over the long holding period of this asset. To tax such gain as if all such appreciation in value had occurred in the year 1944 would negate and render meaningless the relief provisions enacted by Congress to encompass just such a precise situation. To tax such sale as a capital gain would best exemplify the fundamental provisions enacted by Congress limiting the taxation of capital gains.

Respectfully submitted,

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No. 13116.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOS VERDES CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

Opinion Below.

The findings of fact and conclusions of law of the District Court [R. 60-69] are not officially reported.

Jurisdiction.

This appeal involves a claim for refund of corporation income and declared value excess profits taxes for the fiscal year ended September 30, 1944, in the amount of \$5,467.88, which sum it had paid when its return was filed on December 15, 1944. [R. 5.] Taxpayer filed a claim for refund on May 9, 1945, and again on October 30, 1946 [R. 17-18, 35-43], on the ground that it had erroneously reported a profit from the sale of undivided land as normal tax net income rather than as net

gain from the sale or exchange of capital assets. The Commissioner disallowed the claim on August 4, 1949. [R. 18, 43-44.] Within the time provided in Section 3772, Internal Revenue Code, and on April 11, 1950, taxpayer filed a complaint in the District Court for the Southern District of California for refund of the alleged overpayment. [R. 3-14.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346(a)(1). Judgment was entered in favor of the United States on July 10, 1951. [R. 69-70.] Within 60 days and on July 28, 1951, notice of appeal was filed. [R. 71.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether profit received by taxpayer from the sale of a parcel of land was taxable as ordinary income or as capital gain under either Section 117(a) or (j), Internal Revenue Code.

Statute and Regulations Involved.

The pertinent provisions of the Internal Revenue Code and Treasury Regulations involved are printed in the Appendix, *infra*.

Statement.

The facts as stipulated by the parties [R. 17-59] and as contained in the findings of fact of the District Court [R. 60-68] may be summarized as follows:

Taxpayer is a corporation organized November 27, 1925, under the laws of the State of Delaware with its principal office and place of business located in the City of Wilmington, County of Newcastle, Delaware. Since 1926,

taxpayer has transacted and is doing business in the County of Los Angeles, State of California. Taxpayer took over from Palos Verdes Syndicate as of January 1, 1926, approximately 12,245 acres of land in the County of Los Angeles, State of California, with other assets, giving in exchange therefor 54,000 shares of its common stock having an aggregate par value of 5,400,000, issued *pro rata* to the members of the syndicate as their interests appeared. This land was known as "Rancho Palos Verdes." [R. 18, 62-63.]

"Rancho Palos Verdes" originally comprised approximately 16,004 acres of unimproved real property in the County of Los Angeles. It was acquired by a group of persons known as the Palos Verdes Syndicate in the year 1913. It consists of very little level land. It rises from the ocean to an elevation of some 1,400 feet in a matter of possibly two or two and one-half miles, and slopes down again to the plains on the inland side. Some of it is suitable for farming, and some of it is made of arroyos and precipitous parcels that are not available for farming. After acquisition, the Palos Verdes Syndicate appointed a general manager to operate and manage the Rancho, and it engaged in incidental farming activities. After holding the land for a period of ten years, the Palos Verdes Syndicate decided to sell the whole parcel, and entered into an agreement to sell in the year 1923. The whole sale was not consummated by reason of the fact that the purchaser was unable to raise sufficient monies to buy the whole rancho. Two portions of the rancho were actually sold, to wit: 3,000 acres in the northerly and westerly edges of the Rancho, and 200 acres on the southerly and easterly edges of the Rancho, and this land was deeded to the Bank of Italy, in trust, for subdivision

and development purposes. These portions were later subdivided and developed and handled by the Bank of Italy and became known as "Palos Verdes Estates" and "Miraleste," respectively. Neither the Palos Verdes Corporation nor the Palos Verdes Syndicate had any further interest therein from the date of sale. [R. 63-64.]

In the month of July, 1944, taxpayer sold to one Snow an unsubdivided portion of taxpayer's real property in the County of Los Angeles, State of California, for the sum of \$90,000, consisting of 422.56 acres. This real property has a cost basis to taxpayer in the sum of \$23,636.93, resulting in a profit or gain of \$66,363.07. During the fiscal year of taxpayer commencing October 1, 1943, and ending September 30, 1944, taxpayer received from Snow on account of the purchase price of \$90,000, the sum of \$27,000, and elected pursuant to Section 44(b) of the Internal Revenue Code to report for income tax purposes the sale upon the installment basis. The real property was contiguous to the subdivision developed by taxpayer. The real property sold to Snow was acquired by the taxpayer as part of the 12,245 acres of land transferred to taxpayer as of January 1, 1926, in exchange for its common stock. This real property has been owned and held by taxpayer since that date, to wit: January 1, 1926. [R. 18-19, 61-62.]

The taxpayer corporation leased out for farming purposes that part of its land that was suitable therefor, throughout the years in question. It rented the property for farm purposes to realize what income it could, until

the land could be sold. In leasing its land for farming purposes, taxpayer reserved the right to enter the leased portion for the construction of roads, pipe lines and power lines. [R. 64, 67, 68.]

The taxpayer corporation also leased some portions of its land for quarrying rock and mining diatomaceous earth and realized royalties therefrom. The sale of decomposed granite was in such a manner that it would not interfere with the later subdivision of the property. The income from farming operations and from rock and earth royalties was insufficient to pay the county real estate taxes; and the taxes for the years 1935 to 1943, were unpaid at the date of the sale involved in this action. [R. 64-65.]

Taxpayer's affairs were handled by a managing vice-president, who rendered an annual report to the shareholders. The annual reports indicated that the only solution for taxpayer's financial difficulties was to sell its lands, as farming was unprofitable; and from the year 1935 to date the taxpayer attempted to and did sell all the property which could be sold. [R. 65.]

The taxpayer subdivided part of its land and offered the same for home sites and called the section "Rolling Hills"; and prior to the actual subdivision of this parcel within the meaning of state and county laws, the taxpayer sold portions of this section as acreage for residential purposes. [R. 65.]

Taxpayer caused to be distributed to the public certain leaflets or brochures describing the land it held. Some

of these brochures were confined to that section known as "Rolling Hills Subdivision," while other leaflets described the balance of the unsubdivided property of taxpayer known as "acreage." Leaflets and brochures relating to the whole ranch were distributed not earlier than the year 1937. In the year 1940, 10,000 postcards were mailed to the public in Los Angeles offering to sell land at \$185 per acre. These cards referred to certain land on the northern periphery of the Rancho; however, taxpayer would have sold any other portion of its land that could have been made the subject of an advantageous sale. [R. 65-66.]

Between 1940 and 1944, the taxpayer made varied and vigorous efforts to dispose of all its real estate holdings to various agencies of the state and Federal Government and caused to be made plats showing the area laid out for park purposes. Between the period from September 30, 1939, to September 30, 1944, the sales of unsubdivided lands increased and outnumbered the sales of subdivided property. Taxpayer sold during the fiscal year ended September 30, 1944, both subdivided land and unsubdivided portions of its property, and sales of its unsubdivided portions greatly exceeded in number its subdivision sales. During the fiscal year ended September 30, 1944, the taxpayer in addition to the Snow sale made 34 other sales of unsubdivided land totaling 531.859 acres and reported these sales as ordinary income. [R. 66, 67.]

All sales of unsubdivided real property were subject to restrictions in the deed preventing use of the property except for residential purposes. [R. 67.]

Although taxpayer made 34 additional sales of unsubdivided property in the fiscal year ending September 30,

1944, which were reported as ordinary income, it has not at any time contended that this acreage represented a capital asset. [R. 67.]

The taxpayer was engaged in the real estate business. It was continuously engaged in the sale of its subdivided and unsubdivided portions of its property. The taxpayer was willing to sell all or any portion of its unsubdivided properties, that could be made the subject of an advantageous sale. The taxpayer in its corporation income and declared value excess profits tax return for the fiscal year ending September 30, 1944, stated that it was in the real estate business. [R. 67-68.]

On the basis of the foregoing facts, the District Court concluded that the parcel of land sold to Snow in July, 1944, was not a capital asset nor an asset used in taxpayer's trade or business, but was held primarily for sale to customers in the ordinary course of business. [R. 68.]

The District Court accordingly sustained the Commissioner's disallowance of the refund. From that conclusion the taxpayer has appealed to this Court. [R. 71.]

Summary of Argument.

The record shows that the acreage sold by taxpayer to Mrs. Snow in July, 1944 was neither a capital asset nor an asset used in taxpayer's trade or business, but was held primarily for sale to customers in the ordinary course of business. Whether property is held primarily for sale within the meaning of the capital gains provisions of the statute is essentially a question of fact. The frequency and continuity of sales have been held to be determining factors in deciding whether a taxpayer is engaged in a trade or business. It is unnecessary that real estate be

taxpayer's sole occupation, or that taxpayer itself engage in the occupation, since sales through agents satisfy the statutory requirements.

The legislative history of the capital gains provisions supports the Commissioner's treatment of the gain involved here as ordinary income rather than as capital gains.

An analysis of all facts shows that the District Court's findings are supported by the record. Taxpayer admitted in its tax returns that it was in the real estate business. It advertised all of its property for sale to the general public and engaged in continuous efforts to sell any property it could to anyone who would buy it. It engaged in the development of the area by building roads, having surveys made, putting in a water line, and plotting all its holdings on maps. Its other activities of leasing land for farming and mining purposes were incidental to the main purpose of selling real estate. The fact that it rented the property for farming pending its sale and that it received income from such rental does not make the property lose its character as an ordinary asset. Taxpayer publicized its holdings by mailing out thousands of circulars and brochures to the public generally. From its incorporation to the taxable year, its actual sales were frequent and continuous and in that year the sales of unsubdivided property outnumbered sales of subdivided land. It made no claim that any other sales were of land held as a capital asset.

Since the findings of the District Court are fully supported by the record and taxpayer has failed to show that they were clearly erroneous, the findings are conclusive and must be affirmed.

ARGUMENT.

The Evidence Amply Supports the District Court's Finding That Taxpayer Held the Property Sold to Snow Primarily for Sale to Customers in the Ordinary Course of Its Trade or Business.

A case of this character, which depends upon the application of Section 117(a)(1) and (j)(1), Internal Revenue Code, Appendix, *infra*, must turn upon its own facts in determining whether the property in question was held by the taxpayer primarily for sale to customers in the ordinary course of trade or business within the meaning of this section. The District Court found that the acreage sold by taxpayer to Mrs. Snow in July, 1944, was neither a capital asset nor an asset used in taxpayer's trade or business, but that it was held primarily for sale to customers in the ordinary course of business. [R. 68.] This conclusion is fully warranted by the law shown in cases previously decided by this Court as applied to the facts in the record.

A. Nature and Extent of Sales Activities.

This Court has consistently held that whether property is held by the taxpayer primarily for sale within the meaning of the capital gains provisions of the revenue laws is essentially a question of fact. *Rubino v. Commissioner*, 186 F. 2d 304, certiorari denied, 342 U. S. 814; *Field v. Commissioner*, 180 F. 2d 170; *Richards v. Commissioner*, 81 F. 2d 369; see also, *King v. Commissioner*, 189 F. 2d 122 (C. A. 5th), certiorari denied, 342 U. S. 829. In *Commissioner v. Boeing*, 106 F. 2d 305, 309, certiorari denied, 308 U. S. 619, this Court stated that—

the facts necessary to create the status of one engaged in a "trade or business" revolve largely around

the frequency or continuity of the transactions claimed to result in a "business" status.

Ehrman v. Commissioner, 120 F. 2d 607 (C. A. 9th), certiorari denied, 314 U. S. 668; *Richards v. Commissioner*, *supra*; *Field v. Commissioner*, *supra*. Moreover, in the *Richards*, *Ehrman*, and *Boeing* cases, *supra*, this Court rejected the liquidation test in determining whether or not the taxpayer was carrying on a trade or business within the meaning of the capital gains provision of the statute. Cf. *Delsing v. United States*, 186 F. 2d 59 (C. A. 5th).

It is, of course, unnecessary that such activity be taxpayer's sole occupation or business, or that it occupy a majority of its time; and it may or may not be related to some other business activity of the taxpayer. *Harvey v. Commissioner*, 171 F. 2d 952 (C. A. 9th); see also, *King v. Commissioner*, *supra*; *Delsing v. United States*, *supra*. It is likewise unnecessary that taxpayer itself engage in the occupation or business, since sales through agents satisfy all requirements of the statute. *Ehrman v. Commissioner*, *supra*; *Brown v. Commissioner*, 143 F. 2d 468 (C. A. 5th); *Welch v. Solomon*, 99 F. 2d 41 (C. A. 9th).

B. Legislative History of Section 117.

The legislative history of the capital gains provisions discloses a congressional purpose to distinguish between property held for sale in the ordinary course of a trade or business and that which is not so held. It thus supports the Commissioner's treatment of the gains from the sale involved here as ordinary income and not capital gains, contrary to taxpayer's contention. (Br. 31-34.)

As this Court stated in *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263, 266-267:

The capital gains provisions are remedial provisions. Congress intended to alleviate the burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect "investment property" as distinguished from "stock in trade," or property bought and sold for profit. It is our view that this policy was not meant to apply to a situation where one of the essential purposes in holding the property is *sale*.

The difference between property *used* and property *held* in a trade or business is first noted in the change made in Section 117(a)(1) by the Revenue Act of 1938, c. 289, 52 Stat. 447. An exception was there added in order to permit taxpayers who had suffered losses on a sale (or on a forced disposition) of property *used* in a trade or business, as distinguished from that held therein, to offset such losses against business gains. The reason given in justification of the change was that gains and losses from the sale or other disposition of property used by the taxpayer in his trade or business were in reality business gains and losses, no less than gains or losses from the sale of property held by him for sale in the ordinary course of his trade or business. See H. Rep. No. 1860, 75th Cong., 3d Sess., pp. 17, 34 (1939—1 Cum. Bull. (Part 2), 728, 732-733, 752); and S. Rep. No. 1567, 75th Cong., 3d Sess., p. 7 (1939—1 Cum. Bull. (Part 2) 779, 783).

By 1942, however, Congress had become concerned with also relieving the taxpayer who had made gains on the sale of such property, *i. e.*, property used in connection with the taxpayer's trade or business. It was this concern which

caused Congress to enact Section 117(j) and thereby to relieve the taxpayer from the burden of the ordinary tax on gains derived from the sale of such property, unless the property was includible in his inventory, or was held by him primarily for sale in the ordinary course of his trade or business. At the same time, however, Congress wished to preserve the taxpayer's right to deduct his losses on such sales as ordinary losses. The device which it adopted to accomplish both results was to require the offsetting of such gains and losses against each other and to provide for the taxation of the gains, if they exceeded losses, at capital gain rates and the deduction of the losses from ordinary income, if these exceeded the gains. See H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 53-54 (1942—2 Cum. Bull. 372, 415); and S. Rep. No. 1631, 77th Cong., 2d Sess., p. 50 (1942—2 Cum. Bull. 504, 545).

During the entire period of some thirty years in which the capital gains provisions have been in effect, the primary purpose of Congress in making the various exceptions, as well as the changes therein, was to insure that gain from the sale of property held for sale—and for nearly fifteen years also that used—in the course of the taxpayer's trade or business should be taxed at ordinary rates, and that only such property as was not so held or so used (except as provided in Section 117(j) with regard to the gain from the sale of property so used), be accorded the preferential capital gain and loss treatment. It follows that there is nothing inconsistent with the *use* of property for farming and at the same time holding it for sale. This is made clear by the terms of the statute itself; for it provides that certain property used by the taxpayer in a trade or business shall be treated as a capital asset, but only such property "which is not" held primarily for sale.

C. The Facts Sustain the District Court's Findings.

The taxpayer corporation was organized for the purpose, among others, of buying, selling, and developing real property [R. 90] and it continuously engaged in the real estate business from the time of its incorporation. [R. 68, 178.] It acquired the entire Rancho Palos Verdes tract in order to sell to persons who were willing to purchase any part of the property. In its corporation income and declared value excess profits tax returns for the fiscal year ended September 30, 1944, the year in which the sale to Mrs. Snow was made, taxpayer gave its business as real estate. [R. 67.] This admission lends strong support to the District Court's conclusion that taxpayer was engaged in the real estate business. *White v. Commissioner*, 172 F. 2d 629 (C. A. 5th); *Oliver v. Commissioner*, 138 F. 2d 910 (C. A. 4th).

There is ample evidence to support the District Court's finding that taxpayer advertised all of its property for sale to the general public and was willing at all times to sell portions of its unsubdivided realty. [R. 68.] Mr. Benedict, chairman of taxpayer's board of directors, testified that Mr. Hanson, vice-president and general manager of taxpayer corporation who was also a licensed real estate broker, first made vigorous and continuous efforts to sell the tract as a whole; that Mr. Hanson was paid commissions on sales, and had an office on the property. [R. 97, 104, 106.] He further testified that the corporation attempted to sell any property it could from 1934 to 1941 in order to pay its taxes [R. 107, 142], and he said, referring to the year 1939, "We were trying to sell property to anyone who would buy it. * * *." [R. 117.]

Taxpayer's development of the tract was not confined to the Rolling Hills subdivided area, which taxpayer seeks to

separate from its other real estate properties. (Br. 27, 30.) There were roads put through other parts of the tract [R. 95, 125, 132, 158]; surveys were made in connection with sales of other areas [R. 125, 172]; substantially all holdings of the taxpayer corporation were plotted on maps [R. 144]; and a water line was put in which went through other portions of the tract [R. 149-150, 169.]

Contrary to taxpayer's contention (Br. 29-30), taxpayer's principal occupation was not farming, or any other activity but real estate. The general manager's report for September 30, 1936, stated that sales of decomposed granite were being made in such a way that they would not interfere with later subdivision of the property. [Ex. D, R. 116.] In the report for 1935 it was stated that the taxpayer was in the process of publicizing its holdings. [R. 115, 125.] In the 1937 report, the statement was made that the lands were unprofitable to farm and that the salvation of the corporation was to sell fine residential property rather than to engage in farming. [R. 125-126.] The 1938 report stated that taxpayer's future was dependent on successful development and sales of its land, and that "Every effort will be made to increase sales during the coming year." [R. 129.] In 1939, the report gave an account of a sale for a Navy housing project, and stated other attempts were being made to sell adjacent property for the same purposes. It stated further [R. 130-131]:

As repeatedly stressed in these annual reports, the management believes that the future of the Corporation lies in successfully disposing of the real estate, either in large blocks or in small home sites or to speculators, and in being ready to take advantage of

the real estate cycles, disposing of as much property as it can during the periods of prosperity, as it is not possible to work the land profitably from a farming standpoint.

In 1940 the report stated again that the real estate business of the corporation was the only profitable enterprise it had. It said [R. 135]:

The corporation is going to be dependent in its survival upon its development of real estate and natural resources. Our natural resources cannot be counted on as a staple income because they are being constantly depleted. Therefore, real estate is our all important merchandise. The only real estate that we have is for residential purposes as the trend at this time is for real estate for use and not for speculation. Broadly speaking, there are two residential uses for our property. One is for year around homes and the other is for week-end places and hobby ranches. The latter are luxuries.

* * * * *

We have tried for months to sell this land for \$300 an acre to speculative builders.

That the public was solicited to buy land, both subdivided and unsubdivided, is clearly shown by the record, in spite of taxpayer's contentions to the contrary. (Br. 27.) The report for 1940 [Ex. H] stated taxpayer had recently mailed out 10,000 postcard circulars offering acreage at \$185 per acre. [R. 136.] Brochures were sent out to the general public [see Govt. Exs. A, A-1, A-2, A-3, A-4] during the years 1937, 1940, 1944, and 1945, some of which referred not only to the Rolling Hills subdivision, but in their text specifically made reference

to the entire property held by taxpayer. [R. 108-110, 119.]

The actual sales made by taxpayer were frequent and continuous. Even before the formation of the taxpayer corporation there had been separate acreage parcels sold by the syndicate out of the Rancho Palos Verdes. [R. 92.] These sales activities continued frequently and continuously down to the taxable year. [R. 94.] Mr. Vanderlip, the president of the taxpayer corporation, testified as to sales to members of the corporation, and to other sales in 1938, 1939, 1940, 1941, and in subsequent years down to 1944. The general manager's report for 1935 tabulated the profit from land sales from 1926 to that year, which ranged from \$4,000 to over \$300,000 per year except for 1932, and the subsequent reports listed a profit of approximately \$10,500 in 1936; \$44,500 in 1938, \$22,271.01 (gross) in 1940; and \$50,000 in 1941. [R. 124, 129, 137, Ex. D.]

The number of sales from 1939 to 1944 of both acreage and subdivided property with the number of acres involved and the selling price are tabulated in Exhibit 7, incorporated in the stipulation of facts. [R. 19, 46.] From 1939 to 1944 sales of unsubdivided lands increased and outnumbered sales of subdivided property. The frequency and continuity of these sales is thus clearly apparent. During 1944, the year in which the sale was made to Mrs. Snow, there were 35 acreage sales of a total of 954 acres, at \$250,500, as against 18 sales of subdivided property, of a total of 154 acres, at a total selling price of \$55,000. Although Mr. Vanderlip testified the corporation had made an error [R. 179] up to the time of this action the taxpayer corporation had made no claim

that any other sales than the one to Mrs. Snow were of land held as a capital asset [R. 67].

From these facts, it is clear that the sales were not casual sales of real estate held for investment as claimed by taxpayer. (Br. 35.) It is also clear that, contrary to taxpayer's contention (Br. 40), there was development of the property and substantial sales activity, so that no exception exists under the facts hereto the frequency of sales test, as previously enunciated by this Court. *Commissioner v. Boeing, supra*. The liquidation test contended for by taxpayer (Br. 35-37) was rejected by this Court in *Ehrman v. Commissioner, supra*. Moreover, the evidence here does not support the contention that taxpayer was merely a passive investor. (Br. 41.) The fact that sales were made through agents [R. 104, 108] does not detract from the taxpayer's status of being engaged in the real estate business. *Ehrman v. Commissioner, supra*; *Brown v. Commissioner, supra*.

The record completely refutes taxpayer's contention that the parcel sold to Mrs. Snow was a Section 117(j) asset because farming was taxpayer's trade or business. The taxpayer rented its tillable property for farm purposes only in order to realize what income it could until the land could be sold. [R. 68.] In leasing its land for farm purposes, taxpayer reserved the right to enter the leased portions for the construction of roads, pipe lines, and power lines. [R. 67, 176.] The portions of the reports previously referred to disclose that farming was considered an unprofitable venture, and that the sale of

real estate was taxpayer's real business. The leasing of land for farming, as well as for mining, oil drilling, and other purposes, was incidental to taxpayer's primary business of selling real estate. It has been held that property such as this which was acquired and held for primary purposes of sale does not lose its character as an ordinary asset even though pending the sale it is rented out and yields income. *Rollingwood Corp. v. Commissioner, supra*; *Kings v. Commissioner, supra*.

The fact that the particular parcel sold to Mrs. Snow had been held by taxpayer for 18½ years before sale (Br. 31) is of no significance. Regulations 111, Section 29.117-1, Appendix, *infra*, specifically say, "In determining whether property is a 'capital asset,' the period for which held is immaterial."

The cases on which taxpayer relies are all distinguishable on their facts, and need not be discussed in detail. The case of *Phipps v. Commissioner*, 54 F. 2d 469 (C. A. 2d) (Br. 35, 40), is distinguishable since in that case there was found to be no development or sales activity which the record here clearly shows to exist. *Guthrie v. Jones*, 72 F. Supp. 784 (W. D. Okla.), appeal dismissed, 163 F. 2d 1018 (C. A. 10th) (Br. 37-38), is distinguishable from the instant situation inasmuch as in the *Guthrie* case taxpayer was in the loan and investment business, had never been in the real estate business, had never solicited or promoted sales, and made only an occasional sale.

D. The Findings of the District Court are Supporteded by the Record and Therefore Must Be Affirmed.

The findings of the District Court are conclusive inasmuch as they are fully supported by the record. Taxpayer has failed to show that the findings were clearly erroneous, and in the absence of such a showing they should not be set aside by this Court. Rule 52(a), Federal Rules of Civil Procedure; *Rollingwood Corp. v. Commissioner, supra*; *Lerner Stores Corp. v. Lerner*, 162 F. 2d 160 (C. A. 9th); *Lincoln Nat. Life Ins. Co. v. Mathisen*, 150 F. 2d 292 (C. A. 9th); *Wingate v. Bercut*, 146 F. 2d 725 (C. A. 9th).

Conclusion.

The decision of the District Court was correct and should be affirmed.

Respectfully submitted,

ELLIS N. SLACK,

Acting Assistant Attorney General.

A. F. PRESCOTT,

CAROLYN R. JUST,

Special Assistants to the Attorney General.

Attorneys for Defendant-Appellee.

WALTER S. BINNS,

United States Attorney.

FRANK W. MAHONEY,

Special Attorney,

Bureau of Internal Revenue.

March, 1952.

APPENDIX.

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 44. INSTALLMENT BASIS.

* * * * *

(b) *Sales of Realty and Casual Sales of Personalty.*—In the case * * * (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 30 per centum of the selling price (or, in case the sale or other disposition was in a taxable year beginning prior to January 1, 1934, the percentage of the selling price prescribed in the law applicable to such year), the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term "initial payments" mean the payments received in cash or property other than evidences of indebtedness of the purchaser

during the taxable period in which the sale or other disposition is made.

* * * * *

(26 U. S. C. 1946 ed., Sec. 44.)

SEC. 117 [As amended by Sections 150 and 151 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), or real property used in the trade or business of the taxpayer.

* * * * *

(4) *Long-term Capital Gain.*—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * * *

(8) *Net Long-term Capital Gain.*—The term “net long-term capital gain” means the excess of long-term capital

gains for the taxable year over the long-term capital losses for such year ;

* * * * *

(10) *Net Capital Gain.*—

(A) *Corporations.*—In the case of a corporation, the term “net capital gain” means the excess of the gains from sales or exchanges of capital assets over the losses from such sales or exchanges ; and

* * * * *

(c) *Alternative Taxes.*—

(1) *Corporations.*—If for any taxable year the net long-term capital gain of any corporation exceeds the net short-term capital loss, there shall be levied, collected, and paid, in lieu of the tax imposed by sections 13, 14, 15, 204, 207 (a) (1) or (3), and 500, a tax determined as follows, if and only if such tax is less than the tax imposed by such sections :

A partial tax shall first be computed upon the net income reduced by the amount of such excess, at the rates and in the manner as if this subsection had not been enacted, and the total tax shall be the partial tax plus 25 per centum of such excess.

* * * * *

(j) *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of Property Used in the Trade or Business.*—For the purposes of this subsection, the term “property used in the trade or business” means property used

in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General Rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion * * * of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, or conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.117-1. *Meaning of terms.*—The term “capital assets” includes all classes of property not specifically excluded by section 117(a)(1). In determining whether property is a “capital asset,” the period for which held is immaterial.

The exclusion from the term “capital assets” of property used in the trade or business of a taxpayer of a character which is subject to the allowance for depreciation provided in section 23(1) and of real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. Gains and losses from the sale or exchange of such property are not subject to the percentage provisions of section 117(b) and losses from such transactions are not subject to the limitations on losses provided in section 117(d), except that under section 117(j) the gains and losses from the sale or exchange of such property held for more than 6 months may be treated as gains and losses from the sale or exchange of capital assets, and may thus be subject to such limitations. See section 29.117-7. Property held for the production of income, but not used in a trade or business of the taxpayer, is not excluded from the term “capital assets” even though depreciation may have been allowed with respect to such property under section 23 (1) prior to its amendment by the Revenue Act of 1942. However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business, as in the case of a dealer in real estate, is not subject

to the limitations of section 117(b), (c), and (d). The term “ordinary net income” as used in these regulations for the purposes of section 117 means net income exclusive of gains and losses from the sale or exchange of capital assets.

* * * * *

Section 117(a)(10) defines “net capital gain.” In the case of a corporation the term “net capital gain” means the excess of the gains from sales or exchanges of capital assets over the losses from such sales or exchanges which losses include any amounts brought forward pursuant to section 117(e).

* * * * *

SEC. 29.117-7 [As amended by T. D. 5394 (1944 Cum. Bull. 274)]. *Gains and losses from involuntary conversions and from the sale or exchange of certain property used in the trade or business.*—Section 117(j) provides that the recognized gains and losses

(a) from the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is

(1) of a character subject to the allowance for depreciation provided in section 23(1), or

(2) real property,

provided that such property is not of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business, and

(b) from the involuntary conversion of capital assets held for more than six months, and

* * * * *

shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. If the aggregate of such gains does not exceed the aggregate of such losses, such gains and losses shall not be treated as gains and losses from the sale or exchange of capital assets.

* * * * *

Section 117(j) does not apply to gains and losses on the sale, exchange, or involuntary conversion of any property which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or which is held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *

No. 13117

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

VS.

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Appellees.

Transcript of Record

Appeal from the United States District Court
Eastern District of Washington,
Northern Division.

FILED

NOV 30 1951

No. 13117

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UNITED STATES OF AMERICA,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellant.

LIONEL E. WOLFF,
Old National Bank Building,
Spokane, Washington,
Attorney for Appellee.

In the District Court of the United States for
the Eastern District of Washington, Northern
Division

No. 892

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiffs for cause of action allege:

I.

That plaintiffs were at all times herein mentioned and are now husband and wife, residing within the jurisdiction of this court.

II.

That defendant United States of America acting by and through the Bureau of Reclamation, Department of the Interior, is the owner of a tract of land lying within the government townsite known as Coulee Dam in Okanogan County, State of Washington. Said tract is bounded on the north by Roosevelt Avenue, on the west by Columbine Avenue, on the south by Fifth Street, and on the east by Fir Avenue; and is occupied by a frame business building known as the "General Store Building" fronting on Roosevelt Avenue.

III.

That on January 28, 1949, and for many years prior thereto the defendant United States of America, acting by and through its Bureau of Reclamation, owned, controlled and maintained said General Store Building and the sidewalks immediately north of and adjoining said Building, which sidewalks were held out as public ways and were used as such, and said sidewalks were heavily traveled and provided ingress and egress to and from the places of business located in said Building.

IV.

That on and for some days prior to January 28, 1949, the premises and sidewalks herein mentioned were in the control of the employees of the Bureau of Reclamation of the United States of America and said employees while acting within the scope of their employment, negligently kept and maintained said premises and particularly the sidewalks giving entrance to the front of said Building, in a highly dangerous, unsafe and defective condition, rendering said sidewalks and the approaches, adits and exists to and from said Building extremely hazardous and unsafe for the use of persons rightfully using the same. That said negligence of the defendant in the operation, management and maintenance of said Building and sidewalks proximately causing the event and injuries hereinafter described consisted of the following:

(1) The roof, eaves, eaves troughs and front portion of said building over said sidewalks were

so constructed and maintained that large quantities of water, snow, ice and sleet were diverted from natural channels and were dropped, cast or thrown on said sidewalks affording entrance to said Building. Said ice, snow and sleet were permitted to accumulate and remain on said sidewalks for days at a time prior to and on the 28th day of January, 1949, rendering the surface of said sidewalks rough, irregular, rounded, uneven, slippery, dangerous and unsafe.

(2) That the defendant's employees failed to remove said snow and ice which had been allowed to accumulate on said sidewalks for several days prior to and including the 28th day of January, 1949, and failed to cover the same with any substance or to otherwise reduce the hazard to those rightfully using said sidewalks.

(3) That the defendant's employees knew or with the exercise of ordinary prudence and care should have known of the defective condition of said building and sidewalks, and that with the use of ordinary prudence and care could have and should have remedied said defects or otherwise made said sidewalks safe for those rightfully using the same.

V.

That on the 28th day of January, 1949, at about 11:26 o'clock a.m. plaintiff Thera Phillips, being then within the jurisdiction of this court, after having done business at the Coulee Dam Beauty Shop, in said building, was leaving said building and of necessity endeavored to walk upon said

sidewalks, stepped upon said rough, irregular, rounded, uneven and slippery surface of ice and snow, slipped and fell.

VI.

That plaintiff Thera Phillips was on January 28, 1949, of the age of 44 years, large, weighing over two hundred pounds, and as a direct and proximate result of the fall above described, so caused by said negligence, she sustained bruises and injuries to her head, a tri-malleolor fracture with a posterior dislocation of her right ankle with obvious deformity and considerable displacement of the fragments, and injuries and weakness of the right ankle, and from said fall she also suffered nervous shock, and strained and bruised ligaments, muscles, and tissues of her limbs and body. That immediately after said fall she lay upon said surface with clothing disarrayed, and her body in immediate contact with the ice and snow for some time before enough men were available to remove her. That a crowd gathered as she thus lay helpless and exposed upon the ice and snow unable to get up. The crowd continued to gather as she was carried into Coulee Dam Co-op Store, Inc., where she was placed upon the floor and lay for half an hour. That she suffered great embarrassment in her predicament, and severe pain and mental anguish. That she was required to secure hospital, medical and surgical treatment by orthopedic specialists. That she was given hypodermics, opiates, and spinal injections to assist her and to ease the pain and shock, and to enable said broken ankle to be X-rayed, reduced and placed

in a cast. She remained under opiates for some time thereafter and was confined to the hospital 15 days, then was confined to a special hospital bed at home in a cast for an additional 5 weeks. After a total of 7 weeks the second cast was removed, replaced and a cumbersome and heavy walking iron was attached. Said plaintiff had 4 different plaster casts applied to the ankle. It was 15 weeks from the date of injury until all casts and irons were finally removed, and thereafter until early August, 1949, it was necessary for her to use crutches in order to walk. The aid of a cane continues and will continue to be necessary.

Plaintiff at the time of said injury was Mother Adviser to the Order of Rainbow Girls; Vice Grand of Rebekah Lodge 315 Grand Coulee; active in Church and Guild activities; Membership Chairman of the League of Woman Voters at Coulee Dam; Vice President of Agnes Gehrman Chapter of the Order of Eastern Star; Program Chairman, musician, and on committees for the Women of Rotary; all of which civic and social activities she has had to curtail due to said injury. For many years prior to the 28th of January, 1949, plaintiff drove the family car, but as a result of the injury she has been unable to do so, all of which inconveniences the plaintiffs, adds to their expenses and curtails their pleasure, recreation and social activities.

That said plaintiff has from the time of said injury and will in the future suffer great mental and physical pain, embarrassment and varying degrees

of immobility. As a result plaintiff suffers permanent disability and impairment of the use of the right ankle. Plaintiff has been damaged as in Paragraph VIII set forth in the sum of \$25,000.00.

VII.

Further as a proximate result of the defendant's negligence plaintiffs were damaged in the following reasonable amounts:

(a) \$30.12 in that plaintiff Thera Phillips was unable to do the family laundry from the date of said injury until December, 1949, and plaintiffs were thereby required to make expenditures to have said laundry done.

(b) \$130.00 in that plaintiff's minor daughter, Thera Phillips, would have continued earning money as a theatre usherette at \$5.00 a week, but was required to terminate her employment to assist at home.

(c) \$19.95 in that plaintiffs were required to make long distance telephone calls relating to medical care and hospitalization.

(d) \$6.00 in that, as a necessary convenience to plaintiff Thera Phillips while confined to her bed, a telephone extension was installed.

(e) \$57.08 for drugs, medical supplies and a cane required by plaintiff Thera Phillips.

(f) \$48.69 in that plaintiff Thera Phillips was required to travel from her home at Coulee Dam to the City of Spokane for medical care and hospitalization on 9 different occasions at \$5.41 per round trip by bus.

(g) \$36.90 in that the clothing worn by plain-

tiff Thera Phillips at the time of the injury was damaged to that extent.

(h) \$34.44 in that plaintiff Thera Phillips was unable to wear her high heeled shoes after said injury and was required to replace them with lower heeled shoes.

(i) \$706.56 in that plaintiff Thera Phillips required hospitalization for a total of 19 days, and required the use of laboratories, operating rooms and hospital X-ray equipment, and required medical, surgical and therapeutic treatment as well as X-rays outside the hospital.

VIII.

Further Plaintiff Homer C. Phillips was completely deprived of Thera Phillips' companionship, wifely services and duties, and of all conjugal rights, and all other elements of consortium during the period of her hospitalization and confinement to her bed at home with casts and braces. Further, such rights now and ever since January 28, 1949, and in the future will be greatly impaired, all to his damage in the amount of \$5,000.00.

IX.

That it has been necessary for plaintiffs to employ the services of their attorneys herein named to prosecute this action, and out of any recovery the Court should award reasonable attorneys' fees, not exceeding 20% thereof, to be paid to said attorneys out of the judgment.

Wherefore, plaintiffs pray judgment against the

defendant United States of America in the amount of \$31,069.74; that out of said judgment reasonable compensation in the amount of 20% thereof be awarded plaintiffs' attorneys herein; for costs and disbursements in this action as by statute provided; and for such other and further relief as the Court may deem just and equitable.

LIONEL E. WOLFF and

STANLEY J. KRESHEL,

By /s/ LIONEL E. WOLFF,

Attorneys for Plaintiffs,

Duly verified.

[Endorsed]: Filed April 18, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and in answer to plaintiff's complaint alleges as follows:

I.

The allegations of paragraph I are admitted.

II.

The allegations of paragraph II are admitted.

III.

The allegations of paragraph III are admitted, with the exception that the defendant denies that it controlled and maintained the sidewalks adjoining said building.

IV.

The allegations of paragraph IV are denied.

V.

The allegations of paragraph V are denied, except that it is admitted that the plaintiff fell on the sidewalk, as alleged, on January 28, 1949.

VI.

It is admitted that the plaintiff fell on January 28, 1949, and sustained certain injuries, but it is denied that said injuries are of a permanent nature.

VII.

The allegations of paragraph VII are denied for the reason that this defendant does not have sufficient information to form a belief as to their accuracy.

VIII.

The allegations of paragraph VIII are denied.

IX.

It is admitted that, if damages should be recovered, reasonable attorneys' fees should be allowed.

First Affirmative Defense

I.

This defendant alleges that the injuries referred to in plaintiffs' complaint are wholly and entirely the result of an act of God and not from any negligence or carelessness on the part of the defendant, its servants, agents or employees, in that the winter of 1949 was the most severe one experienced at Coulee Dam since the construction of the building described in plaintiffs' complaint; that on or about January 28th there was an unprecedented accumulation of snow and ice from natural causes; that for several days prior to said date, snow fell during the day and froze at night.

Second Affirmative Defense

I.

Further answering said complaint, and as a second affirmative defense thereto, this defendant alleges that if plaintiff, Thera Phillips, sustained any injuries, or plaintiffs sustained any damages by reason of the matters and things set forth in plaintiffs' complaint, same were caused by plaintiff, Thera Phillips, proximately contributing thereto, in that at the time of the injuries alleged in plaintiffs' complaint, plaintiff, Thera Phillips, was, and for some time prior to her fall, had been fully acquainted with the unusual prevalent weather conditions in Coulee Dam and was aware of the condition of the sidewalk described in said complaint, and knew all about the condition relative to the snow and ice at the place thereon that the fall occurred, but nevertheless, hurried over said place and otherwise failed to exercise ordinary care and prudence for her own safety.

Wherefore, defendant prays that an order be entered, dismissing the complaint of plaintiffs with prejudice and without costs, and that plaintiffs take nothing thereby.

/s/ HARVEY ERICKSON,

United States Attorney.

WITHERSPOON,

WITHERSPOON & KELLEY,

Of Counsel.

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 18, 1951.

[Title of District Court and Cause.]

ORDER FOR PRE-TRIAL CONFERENCE
UNDER RULE 16

To Lionel E. Wolff, Attorney for Plaintiff, Old National Bank Bldg., Spokane, Washington; Harvey Erickson, U. S. Attorney, Federal Bldg., Spokane, Washington; William V. Kelley, Of Counsel for Defendant, Old National Bank Bldg., Spokane, Washington.

By virtue of Pre-Trial Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, you are hereby directed to appear before the undersigned Judge of the above entitled court at Spokane, on Friday, March 30, 1951, at 1:30 p. m. to consider

- (1) The simplification of the issues.
- (2) The necessity or desirability of amendments to the pleadings.
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.
- (4) The limitation of expert witnesses.
- (5) Such other matters as may be of aid in the disposition of the action.

It is requested that counsel produce at the pre-trial conference all documents or physical objects which he intends to offer as evidence at the trial. Any document not so produced will not be admitted

at the trial unless good cause is shown why it was not produced at the pre-trial conference.

It is suggested that in order to obtain the best results in a pre-trial conference, counsel should have with him the party, in case of an individual, or some responsible officer or agent with authority to speak for the party, in the case of a corporation.

The Clerk of this Court is directed to forthwith serve this order upon the above named parties by mailing a copy hereof to their attorneys at the addresses disclosed by the record herein.

Dated this 13th day of March, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

Copies served.

[Endorsed]: Filed March 13, 1951.

[Title of District Court and Cause.]

NOTICE OF EXAMINATION OF DOCUMENTS AND OF DEPOSITION UPON ORAL EXAMINATION

To the above named Defendant and to Harvey Erickson, Frank R. Freeman, Witherspoon, Witherspoon and Kelley, your Attorneys:

You, and Each of You, Will Please Take Notice that the undersigned will orally examine under oath the following named persons:

Mr. Alfred Darland, Coulee Dam, Washington,

Mr. C. E. Benjamin, City Engineer, Coulee Dam, Washington,

Mr. Phil Nalder, Assistant District Engineer, Bureau of Reclamation, Coulee Dam, Washington,

Mr. Torloff Torkelson, District Land Officer, Bureau of Reclamation, Coulee Dam, Washington,

before a court reporter and Notary Public of the State of Washington, at the office of Paul LeMargie, attorney for the Bureau of Reclamation, in the Administration Building, Coulee Dam, Washington, at the hour of 11:00 o'clock a. m. on the 26th day of October 1950, and such examination will be continued from time to time and from day to day until the same is fully taken and completed.

At the said time and place the undersigned will also inspect, copy, examine or photograph books, papers, agreements, leases, rules, regulations and documents containing all pertinent rights and duties relating to the maintenance and control of the building and sidewalks and relating to the tenancy, duties, rights and liabilities of persons in, about and around said sidewalks and premises known as the "General Store Building" at Coulee Dam, Washington, as described in the Complaint on file herein.

Dated this 20th day of October, 1950.

LIONEL E. WOLFF, and

STANLEY J. KRESHEL,

By /s/ STANLEY J. KRESHEL,
Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

REPLY

Come now the plaintiffs and, by way of reply to defendant's answer and affirmative defenses, admit, allege and deny as follows:

I.

Deny the allegations of Paragraph I of defendant's first affirmative defense.

II.

Admit that Plaintiff Thera Phillips knew what the weather conditions were in Coulee Dam and was aware of the condition of the sidewalk, but specifically deny all of the other allegations, matters and things set forth in Paragraph I of the defendant's second affirmative defense.

Wherefore, Plaintiffs pray for the relief requested in their complaint on file herein.

LIONEL E. WOLFF, and

STANLEY J. KRESHEL,

By /s/ LIONEL E. WOLFF,

Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

ORDER ON PRETRIAL CONFERENCE

Pursuant to an order for pretrial conference under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 30th day of March, 1951. Lionel Wolff and S. J. Kreshel appearing as attorneys for the plaintiffs and Harvey Erickson, U. S. Attorney and William V. Kelley appearing as attorneys for the defendant.

It is stipulated that the plaintiffs have paid the amounts shown in the following identifications.

Plaintiff's Identification "1" Bills for drugs.

Plaintiff's Identification "2" Hospital Bills.

Plaintiff's Identification "3" Doctors' Bills.

Plaintiff's Identification "4" Bill for Physiotherapist.

Plaintiff's Identification "5" Anesthesiologist's Bill.

Plaintiff's Identification "6" Clothing Bills.

Plaintiff's Identification "11" Telephone bills (tolls).

Plaintiff's Identification "7" Draft of floor plan of building.

It is stipulated that Plaintiff's Identification "7" may be admitted without objection.

Plaintiff's Identification "8" to "8-h" Photos of building.

Plaintiff's Identification "9" Letter Nalder to Wolff 11/23/49.

Plaintiff's Identification "10" Letter Banks to Wolff 12/1/49.

Defendant admits the authenticity of Identifications 9 and 10 but reserves all other objections to their admissibility in evidence.

Plaintiff is granted the right to offer in evidence, the shoes and galoshes worn by the plaintiff at the time of the accident.

Defendant's Identification "12" Photo close-up of building.

Defendant's Identification "13" Photo of building and area.

Defendant's Identification "14" Weather reports.

Plaintiff stipulates that Defendant's Identification 13 may be admitted without objections and admits the authenticity of Identification 14 but reserves all other objections to its admissibility in evidence.

It is further stipulated that the photostatic copies of documents attached to the depositions of Messrs. Nalder, Torkelson and Benjamin, including daily work reports which were not marked by the notary, may be admitted without objection as to authenticity but defendant reserves all other objections to their admissibility in evidence.

Plaintiff's Motion to strike lines 7 and 8 of the second affirmative defense argued and denied.

Dated this 11th day of April, 1951.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed April 11, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came regularly on for trial before the undersigned Judge of the above entitled Court without a jury. Plaintiffs appeared in person and by their attorneys, Lionel E. Wolff and Stanley J. Kreshel. The defendant appeared through the District Attorney, Harvey Erickson, and Attorneys Witherspoon, Witherspoon & Kelley. All parties having announced themselves ready for trial, witnesses were sworn on behalf of all parties, testimony taken and documentary evidence introduced, and the Court having heretofore entered its Memo-

random Opinion and being fully advised in the premises, does make the following:

Findings of Fact

I.

That plaintiffs were at all times herein mentioned and are now husband and wife, residing within the jurisdiction of this court.

II.

That defendant United States of America, acting by and thru the Bureau of Reclamation, Department of the Interior, is the owner of a tract of land lying within the government townsite known as Coulee Dam in Okanogan County, State of Washington. Said tract is bounded on the north by Roosevelt Avenue, on the west by Columbine Avenue, on the south by Fifth Street, and on the east by Fir Avenue; and is occupied by a frame business building known as the "General Store Building" fronting on Roosevelt Avenue.

III.

That on January 28, 1949, and for many years prior thereto the defendant United States of America, acting by and through its Bureau of Reclamation, owned, controlled and maintained said General Store Building and the sidewalks immediately north of and adjoining said Building, which sidewalks were held out as public ways and were used as such, and said sidewalks were heavily traveled and provided ingress and egress to and from the places of business located in said building.

IV.

That on and for some days prior to January 28, 1949, the premises and sidewalks herein mentioned were in the control of the employees of the Bureau of Reclamation of the United States of America and said employees while acting within the scope of their employment, negligently kept and maintained said premises and particularly the sidewalks giving entrance to the front of said Building, in a highly dangerous, unsafe and defective condition, rendering said sidewalks and the approaches, adits and exits to and from said building extremely hazardous and unsafe for the use of persons rightfully using the same. That said negligence of the defendant in the operation, management and maintenance of said Building and sidewalks proximately causing the event and injuries hereinafter described consisted of the following:

(1) The roof, eaves, eaves troughs and front portion of said building over said sidewalks were so constructed and maintained that large quantities of water, snow, ice and sleet were diverted from natural channels and were dropped, cast or thrown on said sidewalks affording entrance to said building. Said ice, snow and sleet were permitted to accumulate and remain on said sidewalks for days at a time prior to and on the 28th day of January, 1949, rendering the surface of said sidewalks rough, irregular, rounded, uneven, slippery, dangerous and unsafe.

(2) That the defendant's employees failed to

remove said snow and ice which had been allowed to accumulate on said sidewalks for several days prior to and including the 28th day of January, 1949, and failed to cover the same with any substance or to otherwise reduce the hazard to those rightfully using said sidewalks.

(3) That the defendant's employees knew or with the exercise of ordinary prudence and care should have known of the defective condition of said building and sidewalks, and that with the use or ordinary prudence and care could have and should have remedied said defects or otherwise made said sidewalks safe for those rightfully using the same.

V.

That on the 28th day of January, 1949, at about 11:26 o'clock a. m. plaintiff Thera Phillips, being then within the jurisdiction of this court, after having done business at the Coulee Dam Beauty Shop, in said building, was leaving said Building and of necessity endeavored to walk upon said sidewalks, stepped upon said rough, irregular, rounded, uneven and slippery surface of ice and snow, slipped and fell. The point on the sidewalk at which she fell was in front of the doorway entrance to the second floor stairs, leading to the mezzanine floor occupied by said Coulee Dam Beauty Shop and defendant.

VI.

That plaintiff Thera Phillips was on January 28, 1949, of the age of 44 years, large, weighing over two hundred pounds, and as a direct and prox-

mate result of the fall above described, so caused by said negligence, she sustained bruises and injuries to her head, a tri-malleolus fracture with a posterior dislocation of her right ankle with obvious deformity and considerable displacement of the fragments, and injuries and weakness of the right ankle, and from said fall she also suffered nervous shock, and strained and bruised ligaments, muscles, and tissues of her limbs and body. That immediately after said fall she lay upon said surface with clothing disarrayed, and her body in immediate contact with the ice and snow for some time before enough men were available to remove her. That a crowd gathered as she thus lay helpless and exposed upon the ice and snow unable to get up. The crowd continued to gather as she was carried into Coulee Dam Co-op Store, Inc., where she was placed upon the floor and lay for half an hour. That she suffered great embarrassment in her predicament, and severe pain and mental anguish. That she was required to secure hospital, medical and surgical treatment by orthopedic specialists. That she was given hypodermics, opiates, and spinal injections to assist her and to ease the pain and shock, and to enable said broken ankle to be X-rayed, reduced and placed in a cast. She remained under opiates for some time thereafter and was confined to the hospital 15 days, then was confined to a special hospital bed at home in a cast for an additional 5 weeks. After a total of 7 weeks the second cast was removed, replaced and a cumbersome and heavy walking iron was attached. Said plaintiff

had 4 different plaster casts applied to the ankle. It was 15 weeks from the date of injury until all casts and irons were finally removed, and thereafter until early August, 1949, it was necessary for her to use crutches in order to walk. The aid of a cane continues and will continue to be necessary.

Plaintiff at the time of said injury was Mother Adviser to the Order of Rainbow Girls; Vice Grand of Rebekah Lodge 315 Grand Coulee; active in Church and Guild activities; Membership Chairman of the League of Women Voters at Coulee Dam; Vice President of Agnes Gehrman Chapter of the Order of Eastern Star; Program Chairman, musician, and on committees for the Women of Rotary; all of which civic and social activities she has had to curtail due to said injury. For many years prior to the 28th of January, 1949, plaintiff drove the family car, but as a result of the injury she has been unable to do so, all of which inconveniences the plaintiffs, adds to their expenses and curtails their pleasure, recreation and social activities.

That said plaintiff has from the time of said injury and will in the future suffer great mental and physical pain, embarrassment and varying degrees of immobility, by reason of which she has been damaged in the sum of \$1200.00.

VII.

That as a result of said injuries plaintiff suffers permanent disability and impairment of the use of

the right ankle, as a result of which plaintiff has been damaged in the sum of \$3000.00.

VIII.

Further as a proximate result of the defendant's negligence plaintiffs were damaged in the following reasonable amounts:

(a) \$30.12 in that plaintiff Thera Phillips was unable to do the family laundry from the date of said injury until December, 1949, and plaintiffs were thereby required to make expenditures to have said laundry done.

(b) \$130.00 in that plaintiffs' minor daughter, Thera Phillips, would have continued earning money as a theatre usherette at \$5.00 a week, but was required to terminate her employment to assist at home.

(c) \$19.95 in that plaintiffs were required to make long distance telephone calls relating to medical care and hospitalization.

(d) \$6.00 in that, as a necessary convenience to plaintiff Thera Phillips, while confined to her bed, a telephone extension was installed.

(e) \$57.08 for drugs, medical supplies and a cane required by plaintiff Thera Phillips.

(f) \$48.69 in that plaintiff Thera Phillips was required to travel from her home at Coulee Dam to the City of Spokane for medical care and hospitalization on 9 different occasions at \$5.41 per round trip by bus.

(g) \$36.90 in that the clothing worn by plaintiff Thera Phillips was damaged at the time of the injury to that extent.

(h) \$34.44 in that plaintiff Thera Phillips was unable to wear her high heeled shoes after said injury and was required to replace them with lower heeled shoes.

(i) \$706.56 in that plaintiff Thera Phillips required hospitalization for a total of 19 days, and required the use of laboratories, operating rooms and hospital X-ray equipment, and required medical, surgical and therapeutic treatment as well as x-rays outside the hospital.

IX.

Further Plaintiff Homer C. Phillips was completely deprived of Thera Phillips' companionship, wifely services and duties, and of all conjugal rights, and all other elements of consortium during the period of her hospitalization and confinement to her bed at home with casts and braces. Further, such rights now and ever since January 28, 1949, and in the future will be greatly impaired, all to his damage in the amount of \$1200.00.

X.

That it has been necessary for plaintiffs to employ the services of their attorneys herein named to prosecute this action, and out of any recovery the Court should award reasonable attorneys' fees, amounting to 20% thereof, to be paid to said attorneys out of the judgment.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

1. That plaintiffs are entitled to Judgment against the Defendant United States of America in the amount of \$6469.74.

2. That out of said Judgment reasonable compensation in the amount of 20% thereof be awarded and paid to plaintiffs' attorneys herein.

3. That plaintiffs are entitled to Judgment against the United States of America for their costs as taxed by the Clerk in the amount of \$432.02.

Done in open court this 8th day of May, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ LIONEL E. WOLFF,

For Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 8, 1951.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

No. 892

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause having come on for trial before the undersigned Judge of the above-entitled Court on April 11, 1951, without a jury. Plaintiffs appeared in person and by their attorneys, Lionel E. Wolff and Stanley J. Kreshel. The defendant appeared through the District Attorney, Harvey Erickson, and Attorneys Witherspoon, Witherspoon & Kelley. All parties having announced themselves ready for trial, witnesses were sworn on behalf of all parties, testimony taken and documentary evidence introduced, and the Court having listened to the argument of counsel and being fully advised in the premises and having rendered its Memorandum Opinion, and the Court having entered its Findings of Fact and Conclusions of Law,

Now, Therefore, Judgment Is Hereby Entered:

1. Against the Defendant United States of America in the sum of \$6469.74.

2. That out of said Judgment, reasonable compensation in the amount of 20% thereof shall be awarded and paid to plaintiffs' attorneys herein.

3. Against the Defendant United States of America for plaintiffs' costs and disbursements as taxed by the Clerk in the amount of \$432.02.

Done in open Court this 8th day of May, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

LIONEL E. WOLFF.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, the defendant above named, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, does hereby appeal to the Circuit Court of Appeals for the Ninth District from the final judgment entered in this action on the 8th day of May, 1951.

Dated this 5th day of July, 1951.

/s/ HARVEY ERICKSON,
United States Attorney;

/s/ FRANK R. FREEMAN,
Assistant United States At-
torney.

CC mailed to Lionel E. Wolff and Stanley J. Kreshel, Attorneys for the Plaintiffs, 7/5/51. ELC, Dep. Clk.

[Endorsed]: Filed July 5, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now the defendant, United States of America, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, and pursuant to the provisions of Rule 75(a) of the Federal Rules of Civil Procedure designates the entire record in the above-entitled case to be the record on appeal, as follows:

Complaint.

Summons.

Affidavit of Service by Mail.

Motion to Dismiss.

Motion to Quash.

Notice of Association.

Notice of Appearance.

Order Denying Defendant's Motion to Dismiss.

Motion for Physical Examination.

Objections to Motion for Physical Examination.

Order.

Answer.

Motion for a More Definite Statement.

Stipulation.

Order Requiring More Definite Statement.

Amended Answer.

Affidavit of Service by Mail.

Stipulation.

Notice of Taking Deposition Upon Written Interrogatories of Eugene D. Wiley, M.D.

Motion to Strike.

Order for Pre-Trial Conference under Rule 16.

Subpoena (Directed to Phil Nalder).

Subpoena (Directed to C. E. Benjamin).

Subpoena (Directed to Alfred Darland).

Subpoena (Directed to Torloff Torkelson).

Notice of Examination of Documents and of Deposition Upon Oral Examination.

Notice of Filing Deposition.

Reply.

Notice of Filing Documents and Depositions on Oral Examinations.

Order on Pretrial Conference.

Proposed Findings of Fact and Conclusions of Law.

Memorandum of Costs and Disbursements.
Findings of Fact and Conclusions of Law.
Judgment.

Deposition of Eugene D. Wiley, M.D.

Reporter's Transcript of all Testimony, all
Exhibits.

Notice of Appeal.

Order Extending Time to File and Docket
Record on Appeal.

Dated this 14th day of September, 1951.

/s/ HARVEY ERICKSON,
United States Attorney;

/s/ FRANK R. FREEMAN,
Assistant United States At-
torney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 14, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF ADDI-
TIONAL CONTENTS OF RECORD ON
APPEAL

Come now the plaintiffs by Lionel E. Wolff, their attorney, and pursuant to the provisions of Rule 75(a) of the Federal Rules of Civil Procedure designate the following additional portions of the record, proceedings and evidence to be included in the record on appeal, to wit:

Subpoena (directed to Sgt. James W. Gee).

Subpoena (directed to Bessie Dumas).

Subpoena (directed to Dr. Willis E. Smick).

Return receipt card from the United States mails attached to the Summons showing service upon the Department of Justice, Washington 25, D. C.

Depositions of Thoralf Torkkelson, Chester E. Benjamin and Philip R. Nalder.

Letter from Attorney Lionel E. Wolff to Mr. Aram LaFramboise, Clerk of the United States District Court, dated April 3, 1951, regarding proposed order on pretrial procedure.

Dated this 21st day of September, 1951.

/s/ LIONEL E. WOLFF,
Attorney for Plaintiffs.

Copy received.

[Endorsed]: Filed Sept. 21, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
AND DOCKET RECORD ON APPEAL

This matter coming on before the Court on the oral petition of Frank R. Freeman, Assistant United States Attorney for the Eastern District of Washington, for the entry of an order extending the time to file and docket the record on appeal in the above-entitled cause, and it appearing to the Court that due cause exists for such extension, and the Court being fully advised in the premises, it is hereby

Ordered that the time for filing and docketing the record on appeal in the above-entitled cause be and it is hereby extended to and including 90 days from the date of filing of the notice of appeal.

Dated this 8th day of August, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

FRANK R. FREEMAN,

Asst. U. S. Atty.

[Endorsed]: Filed August 8, 1951.

United States District Court, Eastern District
of Washington, Northern Division

Civil No. 892

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Wednesday, April 11, 1951, at 10 o'clock a.m. before the Honorable Sam M. Driver, United States District Judge, the plaintiff's appearing by Lionel E. Wolff and Stanley Kreshel, attorneys at law of Spokane, Washington, the defendant appearing by Harvey Erickson, United States Attorney, of Spokane, Washington, and William V. Kelley, of Witherspoon, Witherspoon & Kelley, attorneys at law of Spokane, Washington, Whereupon, the following proceedings were had and done, to wit:

The Court: You gentlemen on both sides have seen the proposed order on pretrial conference the Clerk has prepared. There has been one paragraph added; there was a little uncertainty about the status of the documents included in the depositions taken. It was my understanding that while the defendant reserved the right to object to them on any

and all grounds, they didn't question their authenticity or require the plaintiff to bring witnesses to identify them. If that's correct, then, the order in its present form is I assume acceptable to both parties?

Mr. Erickson: Yes.

The Court: You haven't any objection to the form of the order, then?

Mr. Wolff: No objection, your Honor.

The Court: All right, it will be entered as drafted. All right, you may proceed, then.

Mr. Wolff: I'd like to make a short statement to the Court.

Plaintiffs' Opening Statement

Mr. Wolff: This is an action for personal injuries against the United States suffered by Mrs. Phillips and her husband Homer Phillips at Coulee Dam on the 28th of January, 1949. We will prove in this action that the townsite of Coulee Dam, upon which is located a general store building surrounded by a sidewalk, is owned by the United States; that the government not only owns but controls and maintains the building and [2*] the sidewalk; that under the Federal Tort Claims Act the government has the same liability as a private person; that private persons in this situation would be liable for negligence; that the government was negligent in failing to maintain the roof in a safe condition, also in failing to maintain the sidewalk in a safe condition, although it our position that regardless of the government's control or maintenance of

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

the sidewalk, that their failure to maintain or control the roof in a safe condition in itself having resulted in ice and snow on that sidewalk, regardless of who maintained and controlled it, the government would be liable, but we can prove both, and that as a result of this negligence to Mrs. Phillips she suffered from a dislocated and broken right ankle; that she went through considerable pain and suffering in connection with her injury and in her confinement thereafter; that she still has to walk with a cane; that she has permanent disability, and that her husband has suffered the loss of consortium.

That she was an active person and enjoyed life in the fullest, engaged in many activities, most of which are now curtailed; that she is a large woman, and therefore her pain and suffering and her injury has been more than it might have been for a person of smaller size; and then I want to say that at the time this action was started we were unable to determine from the doctors the full extent of her injuries, and therefore as good prudence would indicate we asked damages in [3] a rather substantial amount. We feel now that we know what those permanent injuries amount to, we know what she's been through, we know what her husband has lost, and we feel that the amount of damages we've asked in the complaint is more than she is entitled to in view of what we have learned since. We do feel, however, your Honor, that at a very minimum she is entitled under the three headings to substantial damages for pain and suffering; we feel that she will prove that she is entitled to at least \$3500.00,

and we feel that for the loss of consortium that her husband has suffered he is entitled to at least \$3500.00, and we feel that for her permanent disability she is entitled to at least \$3500.00.

Now, it is also our position that under the pleadings many matters have been disposed of, and it remains for us to prove in paragraph 2 of our complaint nothing, inasmuch as it's been admitted, 1 and 2. In paragraph 3, the defendants have admitted everything except that the Bureau controlled and maintained the sidewalks. Other matters have been admitted. Paragraph 4 has been denied, and it will be our obligation to prove the negligence alleged in paragraph 4 fully. In paragraph 5, as to the fall, it has been admitted that she fell, but we will be obligated to prove all of the other allegations surrounding the fall. As to paragraph 6, referring to the injuries, I take it from the pleading that the only denial is that there are permanent injuries, and that we need not prove [4] any of the allegations except that these injuries are permanent.

The Court: Which paragraph is that?

Mr. Wolff: Paragraph 6, showing how she suffered, what she went through, and the details of her social activities and how they have been curtailed. It's our position that the answer merely denies that the injuries are permanent, and the rest are admitted.

The Court: I should think, however, that it might be well for you to go into the matter of her injuries both as to their character and her experience in reference to them, in order to enable the

Court, if nothing else, to fix the amount of her damages in case the Court finds for the plaintiff. Whether it's been denied or not the Court would have to know the extent of seriousness of her injury and the amount of pain, and so on.

Mr. Wolff: We intend to show that. As to our paragraph 7, setting forth the amount of money that she has spent, the special damages, I believe that through the pretrial procedure the amounts have been agreed upon, and it is now our obligation to prove that it was necessary for her to expend these sums. They have denied the loss of consortium, and they have admitted the allegation as to an award of fees out of any judgment, so we will proceed to put on our evidence to substantiate that complaint.

The Court: Do you have any statement at this time, gentlemen? [5]

Mr. Kelley: May we reserve our statement?

The Court: Yes.

Mr. Wolff: Call Mr. Benjamin..

CHESTER E. BENJAMIN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your full name, please? A. Chester E. Benjamin.

Q. Where do you live?

(Testimony of Chester E. Benjamin.)

A. Coulee Dam, 206 Columbia Street, Coulee Dam, Washington.

Q. What's your occupation?

A. I'm an engineer, and my present assignment is city engineer of the town of Coulee Dam.

Q. You work for the Bureau of Reclamation?

A. Yes.

Q. Calling your attention to the 28th of January, 1949, was your employment the same at that time? A. Yes.

Q. How long had you been in that job?

A. I believe about nine years now. I'd have to check the dates. I think about nine years.

Q. As of now it's been about nine years. Are you a graduate engineer, Mr. Benjamin?

A. No, sir. [6]

Q. Your occupation is that of city engineer?

A. Yes.

Q. Was there a city manager at Coulee Dam in January, of 1949? A. Yes.

Q. Was his name Mr. Garen? A. Yes.

Q. And you were the assistant also to Mr. Garen?

A. During his absence I acted as his assistant, yes.

Mr. Kelley: I can't hear you.

A. During his absence I acted for him, and I am his assistant when he is present.

Mr. Wolff: We want the record to show that we are calling Mr. Benjamin as an adverse witness.

The Court: All right.

Q. (By Mr. Wolff): Now, in your work there

(Testimony of Chester E. Benjamin.)

at the Dam, Mr. Benjamin, was it not your responsibility to look after the maintenance and operation of structures owned by the United States in the town?

A. There are some exceptions to that. I do not have any responsibility for the power houses and dams and the appurtenant construction.

Q. And you also acted as building inspector at that time, January, 1949? A. Yes.

Q. You were employed in what was known as the municipal office? [7] A. Yes.

Q. Calling your attention to the building known as the General Store Building in Coulee Dam, I want to show you a photograph—may I have those pictures?

Questions by the Court:

Q. The city manager you mentioned, I presume, was with the Bureau of Reclamation?

A. Yes, sir.

Q. Was his position known as city manager?

A. Yes.

Q. This Coulee Dam, is that what used to be known as the Engineers' Town or Engineers' City there?

A. It includes that, and the old contractor's town of Mason City.

Q. Oh, it's on both sides of the river below the Dam? A. Yes, sir.

Q. Part of it is in Okanogan County and part of it in Grant, or is it Douglas? A. Both.

(Testimony of Chester E. Benjamin.)

Q. I see, three counties?

A. Yes, they come together.

Q. I don't remember just how the river bends around; the old Mason City was in Okanogan County?

A. Yes, that's the east side.

Q. And the other side is Grant and [8] Douglas?

A. Yes, sir; a very small part in Grant.

Further Direct Examination

By Mr. Wolff:

Q. These have been identified, I believe, and I want to show you, Mr. Benjamin, a document that we refer to as Defendant's Exhibit number 13, and ask you if you recognize that photograph?

A. Yes, I do.

Q. Can you state whether or not it shows the structure known as the general store building at Coulee Dam?

A. It shows most of it; this is it.

Q. Specifically, you're pointing to the building shown on the left hand side of the picture?

A. Yes.

Mr. Wolff: Now, let's see, this was previously identified, and I move its introduction in evidence.

The Court: Is there anything to indicate when that was taken? Perhaps you might be able to agree to that. The important thing is that the Court know whether that's taken at the time or near the time of the accident, or since.

Mr. Wolff: The purpose at the moment in intro-

(Testimony of Chester E. Benjamin.)

ducing it, your Honor, is merely to set the scene and show the building, and of course it's—

The Court: Well, that's what I thought; it isn't intended to show the condition at the time of the accident? [9]

Mr. Wolff: That's not our purpose in introducing it now.

The Court: All right; any objection?

Mr. Kelley: No, your Honor. It doesn't have any date on it.

The Court: It may be admitted, then.

Mr. Kelley: I just make the inquiry of Court and counsel, do you suppose we could put these exhibits in in order?

Mr. Wolff: In accordance with the number already on them?

Mr. Kelley: Yes.

Mr. Wolff: It would be difficult to do that, Mr. Kelley. Number 1 starts with the bills Mrs. Phillips paid.

The Court: I think we should keep the same numbers as in the pretrial conference.

Mr. Wolff: We will refer to this, then, as Defendant's Exhibit 13?

The Court: Yes, it's been our custom to call them identifications until they're admitted.

The Clerk: Shall I now mark it Plaintiff's Exhibit 13? It was a defendant's identification in the pretrial, but it's now offered by the plaintiff. I could carry the same number.

(Testimony of Chester E. Benjamin.)

The Court: Yes, I think you'd better just call it [10] plaintiff's then.

(Whereupon, the Defendant's Identification No. 13 was admitted in evidence as Plaintiff's Exhibit No. 13.)

The Court: Now, where is that building; is that in the old Mason City, or the old Engineers' Town?

A. It's in the old Mason City, your Honor.

The Court: Yes, across the river.

Q. (By Mr. Wolff): Now, Mr. Benjamin, I want to show you this document, it's marked plaintiff's identification number 7, and ask you if that is not the floor plan of the building shown in the last photograph?

A. It is intended to be the building. It may not be correct in all interior details, but it is the general store building.

Mr. Wolff: We move the introduction in evidence of this document.

The Court: It will be admitted. It's provided in the pretrial order that it may be admitted.

(Whereupon, Plaintiff's Exhibit No. 7 for identification was admitted in evidence.)

Q. (By Mr. Wolff): Now, Mr. Benjamin, I want to show you this paper that's marked defendant's identification number 12, and ask you if that is not a photograph showing the north side of the general store building? [11]

A. It is.

Mr. Wolff: We move the introduction in evi-

(Testimony of Chester E. Benjamin.)

dence of this document referred to as defendant's identification 12.

The Court: Any objection to 12?

Mr. Kelley: No objection.

The Court: It will be admitted.

(Whereupon, the defendant's identification number 12 was admitted in evidence as Plaintiff's Exhibit No. 12.)

Mr. Kelley: That was the north side, I think you said? A. Yes, sir.

The Court: I was just trying to get oriented here on the floor plan of the building. Where would this number 12 be? You say that's the north side of the building; would that be up here on Roosevelt Avenue? A. Yes, that's correct.

Q. (By Mr. Wolff): Is this gray strip running along the building in front of the automobiles a sidewalk, Mr. Benjamin?

A. Yes. You're not speaking of the dark shadow? That's the curb.

Q. Yes, but there is a sidewalk adjoining the building on the north side, along Roosevelt Avenue?

A. Yes.

Q. And while the view is obscured by the automobiles in this [12] picture, the sidewalk does extend the full length of the building, does it not?

A. On this side?

Q. On the north side of the building.

A. Yes.

Q. And you will note in this photograph an open

(Testimony of Chester E. Benjamin.)

doorway, the only open doorway in the photograph?

A. May I correct you?

Q. Yes.

A. The doors are recessed at that point, you see, the doors are in a little more. They're not open.

Q. All right. You're referring to the dominant doorway near the center of the photograph?

A. Yes.

Q. And does the sidewalk extend in front of that doorway? A. Yes, it does.

The Court: Is that the doorway that's marked on here, the new entrance to the mezzanine floor and stairs? A. Yes, your Honor.

Q. And do you know where that doorway leads?

A. Yes, I do.

Q. Tell us.

A. It runs up twelve or fourteen steps and turns right and leads onto the mezzanine floor.

Q. So it leads to the mezzanine floor store [13] rooms? A. It does.

Mr. Kelley: Will your Honor pardon the interruption? In connection with your Honor's question, your Honor was referring to exhibit 7, for the record?

The Court: Yes.

A. They're not store rooms; they're offices and other rooms. There are rooms up there.

Q. Now, let's take plaintiff's exhibit 7 along with plaintiff's exhibit 12, and wouldn't it be correct to turn this this way?

A. It wouldn't for me; it might be for you.

(Testimony of Chester E. Benjamin.)

Q. But to match up with the photograph?

A. To match the photograph, yes, sir.

Q. And I want to ask you about this doorway; just inside the doorway is there any—does that doorway lead to anybody's place of business on the main floor?

A. Not on the main floor. It leads to a place of business on the mezzanine floor.

Q. And is there a large hall on the mezzanine floor?

A. There's quite a large open space, yes, sir.

Q. Well, I don't mean a runner hall, but a meeting hall, on the second floor?

A. It is used sometimes for the purpose, but it is not a meeting hall.

Q. An assembly room, or some such thing? [14]

A. It's been used for that. It's not really an assembly room.

Q. Well, the administration permits its use for that purpose? A. Occasionally.

Q. Yes. Does this doorway that we just referred to lead to some storage space on the main floor?

A. No, sir, not on the main floor.

Q. All right.

A. That's an enclosed stairway that leads to the mezzanine floor only.

Q. It leads no place except upstairs?

A. That's correct.

Mr. Kelley: Pardon the interruption; just for the record I wonder if he could designate this entrance or doorway he's talking about?

(Testimony of Chester E. Benjamin.)

The Court: Yes, I think there should be some indication on the floor plan.

A. It's the one described here.

Q. (By Mr. Wolff): Take the pencil, if you will, Mr. Benjamin, and mark with a symbol—let's write the word doorway just where the doorway exists on exhibit 7. That's fine. You don't need to write the word exhibit 7; it's on there. It appears to be, then, a double door there, Mr. Benjamin, is that right?

A. That's correct.

Q. Now, will you mark the same on the photograph? Just write [15] the words "doorway to mezzanine." All right; now, to have these both the same, let's have this one on exhibit 7 say "doorway to mezzanine." That's fine.

A. That's already marked on there, I'd like to call your attention to that, the plan is already marked "doorway to mezzanine."

The Court: Yes, it's already described.

Q. Mr. Benjamin, the roof of this building is not insulated, is it?

A. No, it is not.

Q. And do you know how much the overhang of the edges are over the doorway? About 30 inches?

A. Well, it's about 26 inches to the gutter and perhaps 32 over the gutter.

The Court: What did you say the overhang was?

A. 26 to the gutter and about 32 over the gutter. I've never measured it, however.

The Court: I'm not sure that I understood your

(Testimony of Chester E. Benjamin.)

previous question and answer as to whether the roof was insulated.

Mr. Wolff: That was the question, your Honor.

The Court: I don't know that I understand it; do you mean insulated underneath against cold or heat or what?

A. That's the way I understood it. [16]

Q. That's the way I meant. In other words, there is no insulating material under the surface of the roof——

A. None of any kind.

Q. ——to prevent heat loss.

The Court: I see. All right.

Q. Now, about that mezzanine, the United States Geological Survey maintain an office up there, do they not?

A. No, the United States National Park Service.

Q. The Park Service, that's right; and some other governmental agencies up there?

A. No other.

Q. The Indian Service? A. No.

Q. No other government agencies; speaking of January 28, 1949, that is?

A. Ever; then or any other time.

Q. All right.

A. With one slight exception. There was a brief time when the National Park Service permitted the United States Geological, or Coast and Geodetic, to occupy a portion thereof. It was for a brief period.

Q. Wasn't that in January of 1949?

A. I couldn't tell you, sir; I don't know. It's

(Testimony of Chester E. Benjamin.)

been some time past, when the surveys were made on Lake Roosevelt.

Q. And the government permitted use of this assembly hall to [17] various lodges from time to time, and organizations?

A. Organizations of some kind, yes.

Q. And that was true in January, 1949?

A. Yes.

Q. And calling your attention again to that same date, January 28, 1949, there were icicles on this building over the point where the entrance goes upstairs, were there not? A. I don't know.

Q. You don't know? A. No.

Q. May I have the deposition? Mr. Benjamin, do you recall that we took your deposition at Coulee Dam, in October of 1950? A. I remember it.

Q. I'll call your attention to the following questions that were asked you at that time: "Are there any records——

Mr. Kelley: Pardon the interruption; what page, Mr. Wolff?

Q. Page 47, Mr. Kelley. The question: "Are there any records showing whether or not there was an accumulation of icicles on the gutter of that building over the point on the sidewalk where there is an entrance that goes upstairs?" Do you recall my asking that question at that time? [18]

A. Yes.

Q. And do you recall your answer, "I don't believe there is any record of those"? You recall that you gave that answer? A. I think so.

(Testimony of Chester E. Benjamin.)

Q. And then the next question, Mr. Benjamin, that we asked was, "Do you know whether there were any icicles there on the 28th of January, 1949?" Do you recall our asking that question?

A. I think so.

Q. And the answer you gave, "I believe there were"?

Mr. Kelley: Well, finish the answer.

Q. Just a moment. Do you recall your answering that?

Mr. Kelley: If your Honor pleases, that isn't the proper way to interrogate the witness; if he's directing his attention to question and answer he should read all the answer.

The Court: Yes, I think so.

Mr. Wolff: You can read the rest of the answer, but I think since it was in sentences we may remind him of it sentence by sentence.

The Court: Yes, you may do that.

Q. Do you recall that answer? A. I do.

Q. You then went on and said "That question is too broad to answer by yes or no"; you also stated that? [19] A. That's correct.

Q. But you did say you thought that there were icicles there at that time?

A. Yes, but I had the advantage at that time of having my reports before me, and I don't have that advantage at the moment.

Q. You don't now have your reports before you?

A. They're in here.

Q. But you did say when you had your reports

(Testimony of Chester E. Benjamin.)

before you that you thought there were icicles there?

A. That's correct.

Q. Now, Mr. Benjamin, you know that the Bureau knocked the icicles off that point of the roof and the entire roof, and removed them frequently, when necessary?

Mr. Kelley: If your Honor pleases, may I respectfully ask counsel to designate for the record what he means by "that point," and also that the question embodies several questions.

The Court: Read the question.

(Pending question read by the reporter.)

Mr. Wolff: I can identify the point.

The Court: All right.

Mr. Wolff: And I might say that all the questions that will follow will refer to the point on the roof directly over the stairway entrance to the mezzanine. Now, [20] do you understand the question, Mr. Benjamin? A. Ask it again, please.

Mr. Wolff: Would you read the question again?

(Pending question again read by the reporter.)

A. Yes.

Q. And it is a fact, Mr. Benjamin, that icicles form there rapidly?

A. Yes, under certain conditions they do.

Q. And it is also a fact that the repair of gutters and eaves on that building, structurally, is the responsibility of the United States?

(Testimony of Chester E. Benjamin.)

Mr. Kelley: Well, just a moment; if your Honor pleases, that calls for a conclusion of the witness, and takes in quite a territory. He can ask what the facts were.

The Court: I think it does call for a conclusion. You can ask who built it and who maintains it and so on. Read the question again. This lawsuit promises to become very technical. After all, it's before the Court, and we're trying to get the facts out, and I don't think we should quibble about words and fine points too much; we'll be here until next month. Read the question.

(Pending question read by the reporter.)

Mr. Wolff: Counsel will have an opportunity to cross-examine, of course. [21]

The Court: Well, the question isn't too clear to me what you mean by responsibility.

The Witness: Nor to me, either.

The Court: I think you might split that up and ask him more in detail about the factual basis for responsibility. I'll sustain the objection to the question in that form.

Q. (By Mr. Wolff): You indicated previously, Mr. Benjamin, that your office has the responsibility of maintenance and operation of structures owned by the United States, with certain named exceptions?

Mr. Kelley: I apologize, your Honor; I feel I should interpose the same objection.

The Court: I'll overrule the objection.

(Testimony of Chester E. Benjamin.)

Q. (By Mr. Wolff): You so indicated, Mr. Benjamin? You recall that? A. Yes.

Q. Now, to follow along on that point, isn't it a fact that the government had the responsibility of repairing specifically the gutters and eaves on this building?

A. Well, I'm not here to determine the United States' responsibility, but the Bureau of Reclamation does repair that roof and gutters.

Q. And those gutters and that roof were repaired this past winter by the Bureau? [22]

Mr. Kelley: Just a moment; this past winter? Subsequent to the accident?

Mr. Wolff: We are now in April of 1951, and that would be the winter that would be called the 1950-51 winter.

Mr. Kelley: Yes, subsequent to the time of the accident; I would think it would be clearly inadmissible, your Honor.

Mr. Wolff: Well, it shows the maintenance and control. We're going into the question of before and after and during that period. He indicated during the period, and now we're asking after the period, and next I intend to ask before the specific date, to show the entire picture of maintenance and control before, at, and after.

The Court: Is there any question about who maintained and repaired this roof? Did anybody ever do anything about it except the Bureau?

The Witness: No, your Honor.

(Testimony of Chester E. Benjamin.)

The Court: Why spend all this time? Are you contesting the fact?

Mr. Kelley: I'm certainly objecting on the specific ground——

The Court: I think I have a right to ask you whether you admit it or deny it.

Mr. Kelley: I don't know, your Honor.

The Court: I should think you would, if you're in [23] this lawsuit as counsel. Don't you know whether the Bureau maintained and repaired that building?

Mr. Kelley: I do not, your Honor.

The Court: All right, go ahead.

Mr. Wolff: Kindly read the last question.

The Court: I'll tell you this; this witness has said nobody else repaired that building; the Court is going to assume his testimony is that the Bureau maintained and repaired this building before and after and at the time of this accident; is that correct?

The Witness: The roof, sir.

The Court: All right, go ahead with something else.

Q. (By Mr. Wolff): That includes the gutters and eaves? A. Yes.

Q. All right. As building inspector did you have occasion to inspect the roof and gutters and eaves over this doorway in January of 1949?

A. Yes.

Q. And as a matter of fact you did make a daily inspection there at that time?

(Testimony of Chester E. Benjamin.)

A. I think I saw it nearly every day, yes.

Q. And you observed shortly before the 28th of January, Mr. Benjamin, that ice forms readily on the eaves of that building?

A. I think that was true during the entire month of January. [24]

Q. Yes, and that it reaches the stage that it's dangerous, and when it does reach that stage you have it removed? A. Yes.

Q. Now, the government cleaned the sidewalks adjacent to the north side of the building, did it not, in January, 1949, Mr. Benjamin?

A. I think that's correct. I would have to check the records.

Q. And do you know, Mr. Benjamin, what the condition of ice or snow was in front of this mezzanine doorway on January 28, 1949?

A. No, I don't know, that date.

Q. Do you know whether or not the sidewalk in front of that door is level, Mr. Benjamin?

A. I know that it is not level.

Q. Do you know what the slant is? Can you express it in degrees?

A. I believe that—this is just a guess, now—it's about——

Q. Based upon your——

A. It's about 6 per cent along the building, and perhaps 2 or 3 inches from the building to the gutter.

Q. It slopes to the west, down to the west?

A. The sidewalk runs to the west and pitches to

(Testimony of Chester E. Benjamin.)

the gutter to the north. There is a slight variation in that grade in front of the entrances, to level up for the doors.

Q. But that's about right for that point in front of the door? [25] A. Approximately.

Mr. Wolff: That's all of the questions. You may inquire.

Mr. Kelley: We're not permitted when he's called as an adverse witness to cross, but if it will save time——

The Court: I think so, at least that's been my view of it, as to the matters that have been gone into on direct, of course, limited to that.

Mr. Wolff: Before cross-examination perhaps we should introduce in evidence the labor reports that have already been identified, I believe, and which relate to this same subject matter, to make the record complete and clear. Since they have been identified I move the introduction in evidence of all of the exhibits attached to the deposition on file herein—how do you refer to this?

The Clerk: Well, I'll take those off.

Mr. Wolff: In addition to the daily labor reports there is a lease that should be part of that.

The Clerk: The lease is here.

Mr. Wolff: And that also has been identified, and I move its introduction in evidence. It's referred to as "Pltfs. Id. No. 1, C.R.S. Notary." You're familiar with those documents, counsel, you have a copy.

(Testimony of Chester E. Benjamin.)

The Court: How many of those documents are there?

The Clerk: As I recall it I think there's only two [26] or three separate documents. Just a minute, now. The lease was marked as exhibit 1 to the deposition. That hasn't been marked in the pretrial at all, and then there are a number of documents that start with—that are marked to the deposition as 10-A through 10-O. It would be my purpose to mark them here, if I may, to mark them now.

The Court: Can't you give them numbers beginning with 15?

The Clerk: Yes, I'll mark the lease as plaintiff's 15.

(Whereupon, copy of lease 6/23/47 was marked Plaintiff's Exhibit No. 15 for identification.)

The Court: I wonder, since counsel for the defense is familiar with them, if we shouldn't take them up one at a time. The difficulty, as I see it, your deposition is not in evidence, and if there's any objection to these, there would have to be some testimony by the witness, I should think, to enable the Court to pass upon the objection.

Mr. Wolff: Your Honor, it's my recollection from the pretrial order that all of those were identified by stipulation; the only question would be their admissibility.

The Court: Well, as I understand, the pretrial order [27] provides merely that the defense will not

(Testimony of Chester E. Benjamin.)

raise any question as to their authenticity, that they are what they purport to be, but if an objection is made I don't know whether I could pass on it or not without having some testimony as to what the document is.

Mr. Wolff: The materiality?

The Court: Yes.

Mr. Wolff: Well, I offer them in evidence. I think they speak for themselves. If there's an objection we will attempt to meet it.

The Court: Well, I'll look at them and see if there's objection. Have you examined them, Mr. Kelley?

Mr. Kelley: Yes, I have examined it.

Mr. Erickson: I have examined it. No objection.

The Court: No objection to the lease; that's plaintiff's exhibit 15.

(Whereupon, Plaintiff's Exhibit No. 15 for identification was admitted in evidence.)

The Clerk: Now, the next series that are marked would be identification 16, which were marked by the reporter in the deposition as 10-A to 10-O. I'm marking all of them as one identification, Plaintiff's 16.

(Whereupon, work requests were marked Plaintiff's Exhibit No. 16 for identification.)

The Court: What are they? What do they appear to [28] be? Of course you can't testify to them.

(Testimony of Chester E. Benjamin.)

Mr. Wolff: Aren't they labeled as work labor reports and orders?

The Clerk: These are work requests——

The Court: First I'll find out if there's an objection to them.

Mr. Kelley: There's no objection to the authenticity, your Honor. If they are offered for the purpose of showing the Bureau's removal of snow and ice on or about January 28, 1949, from the sidewalk at the point previously identified in both the exhibits 12 and 7, there is an objection as to their competency, on the grounds that the exhibits don't substantiate such a claim. We haven't any testimony other than what Mr. Benjamin has given.

The Court: Well, if there's any objection at all to this series I think, Mr. Wolff, you should go into the matter of what these reports are and where they came from and what they show. It isn't clear to me from the documents themselves just what they are.

Mr. Wolff: We'll do that. Where are the others?

The Clerk: I'm marking them now.

The Court: What are you marking now?

The Clerk: Documents entitled "Daily Labor Report" purported to be dated from January 3, 1949, through January 28, 1949. I'm marking it as plaintiff's identification 17. [29]

(Whereupon, sheaf of Daily Labor Reports was marked Plaintiff's Exhibit No. 17 for identification.)

(Testimony of Chester E. Benjamin.)

Mr. Wolff: These are offered as a part of the same bundle that I originally spoke of; they were a part of the deposition.

The Clerk: Yes, they were with the deposition.

Mr. Wolff: If we may, then, set the objectionable material aside for the moment, and proceed with those that were a part of the deposition——

The Clerk: These were all a part of the deposition.

The Court: Now, if you'll show counsel the one you have marked 17, and see if there's any objection to that.

Mr. Kelley: May I ask, is what is now marked plaintiff's 17 the same as formerly exhibits 11-A and B to the deposition?

The Clerk: Yes, those two documents marked to the deposition 11-A and B are the last two pages of that one that you have in your hand. You will recall that there were a number of documents in the deposition envelope that had not been marked by the notary, and those are all of them, including what he had marked as 11-A and B.

Mr. Kelley: Merely for the record, there's no jury and I won't labor it, I make the same objection, and if [30] this plaintiff's 17 is the same as what was hitherto exhibits 11-A and B on the deposition, we object on the specific grounds that they don't substantiate the claim of removal of snow and ice on or about January 28, 1949, from the sidewalk by the Bureau, or from the eaves, and if it will aid your Honor any, the reason for that on a

(Testimony of Chester E. Benjamin.)

previous examination was that they only refer to removing icicles from Co-Op Store, with no designation where on this building it occurred; merely for the record.

Mr. Wolff: I think an examination of these by the Court will show that they do substantiate right on their face——

The Court: Well, if there's some dispute as to what the records show, that wouldn't prohibit my admitting them for what they may be worth. I think, though, you're taking a chance, while you have this witness here, if this can be cleared up so that I might be better able to pass on the dispute as to what the documents show, you should bring it out at this time. Of course you know that better than I do.

Mr. Wolff: That's a good suggestion.

Further Direct Examination

By Mr. Wolff:

Q. Mr. Benjamin, I want to show you plaintiff's identification 17, and start with the daily labor report dated January 28, 1949, of which there appear to be two pages, and specifically [31] that page that has written on it the writing "Plaintiff's Exhibit No. 11-A, C. R. Shuff, Notary," and calling your attention to the writing "Plowing snow off sidewalks," can you state—first of all, calling your attention to this document and the writing on it, this is a report relating to your office, is it not?

A. Yes.

(Testimony of Chester E. Benjamin.)

Q. And can you state where the snow was plowed off the sidewalk as referred to there? Do you know of your own knowledge?

A. It might be necessary for me to make a little detailed explanation there.

Q. Go ahead.

A. This plowing is done with a power machine, a small tractor similar to a garden tractor, and the principal thoroughfares, sidewalks, are plowed at one time. The man generally starts in the morning at the beginning of town and goes through the town plowing out the main thoroughfares where it's necessary to get people to work if the snow is drifted or if it is deep. I'm not certain that the plow is ever used on that sidewalk, but using the word "plowing" indicates the men used the machine.

Q. And plowed throughout the town?

A. Yes, but does not mean he necessarily plowed that sidewalk.

Q. But it could mean that? [32]

A. I am not aware that he ever used that machine on that sidewalk. It is somewhat hazardous to use it around many pedestrians.

Q. As indicated, the men spent many hours that day in that task, specifically 23 hours, isn't that correct?

A. About 21 hours, I would say.

Q. And the foreman 2 hours more?

A. And the foreman supervising the crew, yes.

Q. And generally this plowing is all around the town, and you don't remember from your own

(Testimony of Chester E. Benjamin.)

knowledge whether it covered this specific walk or not?

A. I couldn't remember that, sir.

Q. Do you have any other records that would indicate whether it did cover this walk or not?

A. I don't believe there is another record.

Q. Do you recall at the time the deposition was taken we asked you to provide for us the records showing where snow was removed from this particular walk? Do you remember that question?

A. Yes. I don't know whether I was able to do it or not.

Q. But do you recall you provided these papers in connection with that deposition?

A. Yes, that's right.

Q. Now, calling your particular attention to this same paper and the words "Removing icicles from Co-Op Store," do you [33] know whether that relates to the General—what do we call this building, the General Store Building?

A. Yes, it does.

Q. And referring you specifically to the photograph marked plaintiff's exhibit number 12, you find the words "Co-Op Store" on that photograph right next to this doorway? A. That's right.

Q. Would you say, then, that this removing of icicles referred to in plaintiff's identification 17 indicates that icicles were removed from the edges along the north side of the General Store Building on the 28th of January, 1949?

A. It does, if that is the date on it, yes.

(Testimony of Chester E. Benjamin.)

Q. That is the date, is it not?

A. That's correct.

Q. Referring to the same part of plaintiff's identification 17 that we've been talking about all this time, we find the words "Plowing snow and sanding streets"; does that relate to a sidewalk job?

A. No, that's the snowplow on the highways.

Q. All right. Now referring, Mr. Benjamin, to the daily labor report dated January 27, 1949, the day shift, which is also part of plaintiff's identification number 17, and calling your attention to the wording "Shoveling snow off sidewalks"—"Shoveling snow on sidewalks," it says— [34]

A. You shouldn't criticize the grammar of my crew.

Q. It indicates they spent 16 hours doing that, is that correct?

A. Yes. I would like to change that preposition from "on" to "off."

Q. You have my consent; and that relates to the sidewalk in front of the General Store Building, does it not, on the north side of the General Store Building?

A. Not necessarily.

Q. It could?

A. It could.

Q. And is it not correct that this is one of the papers you provided in response to our request at the deposition to bring the records showing the removal of snow from sidewalks in front of this mezzanine doorway? This is one of the documents, is it not?

A. No, you didn't ask me that when you asked

(Testimony of Chester E. Benjamin.)

me to furnish these documents. You asked me to furnish documents showing the government shoveled snow off sidewalks, and this is one of them.

Q. Do you mean that you do not feel that that indicates snow was shoveled from in front of this doorway on the 27th?

A. I don't think it would be positive proof, although it could mean that.

Q. It could mean that? [35]

A. It could.

Q. You are satisfied that it might?

A. It might mean that, yes.

The Court: Do you have other documents that you didn't produce that show shoveling at that time?

A. No. Your Honor, this might mean the sidewalks across the bridge.

The Court: Well, did you hold back some documents that show removal of snow?

A. No, your Honor. It is not all, but it is a portion of that. The gentleman who is questioning me did not ask if this was all of them. This is from that group.

The Court: Well, you knew what he wanted, didn't you? You knew about this lawsuit?

A. He didn't accept them all, your Honor. I gave him every document we had that showed movement of snow at that time. He didn't accept them all. He accepted these.

Q. (By Mr. Wolff): Well, you recall, Mr. Benjamin, what we were looking for when we were down there, the same thing we're talking about

(Testimony of Chester E. Benjamin.)

now, the removal of snow and ice from this particular walk in January, 1949?

A. I remember that.

Q. And these are the papers you gave us that were closest to showing it?

A. These are a portion of them. [36]

The Court: If you've got other documents that show that, Mr. Benjamin, I'll send you back to get them. We're not going to quibble about that; if you've got anything else material to this lawsuit you can go and get them, and I'll order you to do that.

A. Your Honor, may I explain?

The Court: Go ahead.

A. I brought all the labor records up for these gentlemen. I didn't know what they were attempting to prove.

The Court: You knew the scene of this accident?

A. Yes, sir.

The Court: Didn't it occur to you they might want to know the conditions pertaining to this particular location?

A. That's correct.

The Court: Didn't you bring the documents pertinent to that?

A. If they're here, he has them.

The Court: I see. Go ahead. This lawsuit isn't a poker game; we're trying to get at the facts here. I think there might be a little more frankness and disclosure here. We're not trying to play

(Testimony of Chester E. Benjamin.)

a game of some kind. I'm trying to get the facts so that I can fairly and according to the law decide this case.

Q. (By Mr. Wolff): You recall, Mr. Benjamin, in connection with [37] the deposition, I asked you this question: "Did you clean——

Mr. Kelley: What was the page?

Q. 58. "Did you clean any snow off the sidewalk at the point where Mrs. Phillips fell on the 28th of January, 1949?" You remember that?

A. I do.

Q. And the answer you gave, "If we removed ice on that day, we removed it from the sidewalk, yes, sir." You recall giving that answer?

A. That's a correct answer.

Q. Now, we asked you this question: "Do you have some records that would show?" You recall we asked that question? A. Yes, sir.

Q. And your answer, "I believe the time books would show, if they are still in existence." Next question, "Well, did your office, or, let's put it this way: was snow and ice ever removed from this sidewalk along Roosevelt Avenue next to that building by the Bureau, was it at any time?" Do you recall that question? A. Yes.

Q. And your answer, "Before or after?" Do you recall that you put it that way?

A. I think so.

Q. And the next question, "Yes, at any time?" and the next answer, "Yes, I believe so." Do you recall that answer? [38] A. Yes.

(Testimony of Chester E. Benjamin.)

Q. Question, "Can you state when?" Do you recall that question? A. Yes.

Q. And your answer, "No, not definitely." Do you recall the answer? A. Yes.

Q. Next question, "Can you state whether it was before or after Mrs. Phillips fell?" Do you recall the question? A. Yes.

Q. Answer, "I think both before and after she fell." And that is true, isn't it?

A. That's true, yes, sir.

Q. So the Bureau did clean the walk both before and after she fell along Roosevelt Avenue in front of that doorway? A. That's correct.

(Short recess.)

The Court: All right, go ahead.

Q. Another question, Mr. Benjamin, please. How big a crew did you have in January of 1949 working on sidewalk cleaning?

A. Oh, that would be hard for me to answer without checking.

Q. Well, isn't it a fact that the papers before you show that on many days you had six or eight men, at least, working on that? [39]

A. I think that would be fair.

Q. You had more men available; if you needed them for that work you could have taken them off other jobs? A. That's correct.

Q. So you had a very substantial crew for that work when you needed it?

(Testimony of Chester E. Benjamin.)

A. That would be a very small percentage of my crew, but it would be a fair crew.

Q. You indicated that you were the city inspector and that you had inspected the roof condition three almost daily, and the same is true of the sidewalk, is it not? A. Yes.

Q. At that particular point. Isn't it also a fact that the ice conditions on that roof presented a problem that kept you quite busy?

A. Well, they presented some problems to me, if that's what you mean. They didn't keep me busy, of course.

Q. You knew that the ice hazard was a real hazard on the eaves of that roof?

A. I was aware of the hazard, yes.

Mr. Wolff: I'd like the Court to rule on the admissibility of the exhibit we last referred to. I think it has been fully identified.

The Court: Well, I think we got off the track a little here, perhaps, going into the contents of them. I [40] had indicated that I would, with the objection of the defendant in mind as to what they show, admit them for what they're worth, and 16 and 17 will be admitted.

The Clerk: 16 has not been offered, your Honor; he has not examined on that.

The Court: Oh? 17 is the one, then.

(Whereupon, Plaintiff's Exhibit No. 17 for identification was admitted in evidence.)

Q. (By Mr. Wolff): Now, Mr. Benjamin, there

(Testimony of Chester E. Benjamin.)

is no doubt in your mind now that you did remove snow and ice from the walk of the General Store Building on January 28, 1949, isn't that correct?

A. I would say that we probably did. I couldn't swear to that.

Q. Well, I'll call your attention to the deposition we took at Coulee Dam, referring to page 71, and ask if you remember this answer: "Here is our daily labor report, which indicates that we removed snow from the sidewalks through the town and removed it from the walks of the Administration Building and General Store Building." Do you recall that answer? A. I think I do, yes.

Q. And that is correct, isn't it?

A. That's probably more correct than my answer now, that I can't remember too well for sure whether we did or not. [41]

Q. And the next question, "On the 28th day of January, 1949?" and the answer, "Five hours and a half and the plowing of the snow and there was one man, eight hours, which indicated that the work began at 8:30 in the morning," so it is a fact that on that day your crew removed the snow and ice from the sidewalk of the General Store? A. I think that's true.

Q. And before and after that you had done the same?

A. Yes, other dates, frequently.

Mr. Wolff: That's all; your witness.

(Testimony of Chester E. Benjamin.)

Cross-Examination

By Mr. Kelley:

Q. Now, Mr. Benjamin, as I understand it, you haven't any personal knowledge of the removal of either snow or ice in front of the entrance as shown by the plaintiff's exhibit 12; you haven't any personal knowledge yourself?

A. You mean did I see them do it?

Q. Yes. A. I didn't see them do it, no.

Q. And you didn't do it yourself?

A. That's correct.

Q. And what you're testifying is in reference to records? A. That's true.

Q. Have you produced all of the records relative to the removal of snow and ice on or about, before or after this date, January 28, 1949, at this place we're discussing? [42] A. Yes.

Q. And do you want the Court to understand that what you're testifying to is what's related in these records, exhibits 16 and 17?

A. That's true. You understand that I have many men who are ordered to do work, and they come back and tell me they have done it, and I rarely observe that it has been done; I assume the man has told me the truth, but I must go by what other men tell me in many cases.

Q. And by the way, did you tell that to Mr. Wolff on the occasion of your deposition down at Coulee Dam, in substance?

(Testimony of Chester E. Benjamin.)

A. Did I tell him that?

Q. Yes. A. What I've just told you now?

Q. Yes. A. I don't recall.

Q. Do you recall when he asked you the names of the witnesses—on page 57, Mr. Wolff—the question, “Do you know their names?” Answer, “No, I wouldn't know. I know who they could be but they could be anyone.” A. I recall that.

Q. Was that the situation then? A. Yes.

Q. Was that the truth of the matter? [43]

A. That's the truth any time in my work.

Q. As I understood you, Mr. Benjamin, in response to counsel's questioning, this sidewalk we're talking about extends the whole length of the store building as shown in exhibit 12?

A. On that side.

Q. On the north side? A. Yes, sir.

Q. And just for the record could you take a look at exhibit 7 and tell the Court approximately what the dimensions are of that building, and how long it is on the north side?

A. If I recall correctly, this building is 220 feet long, and 100 feet wide. It has on the north side a sidewalk—I'm guessing, now—but in the neighborhood of 8 to 10 feet, perhaps, wide, extending the full length of the north side. It has no sidewalk on the west side. It has a small blacktop walk perhaps 4 or 5 feet wide on the south side, and a wooden walk which is underneath a porch on the east side, a covered walk.

Q. Now, with respect to this doorway that coun-

(Testimony of Chester E. Benjamin.)

sel has asked you about, doorway to the mezzanine shown in plaintiff's exhibit 12, that leads to the mezzanine?

A. Yes, it leads to a stairway that goes to the mezzanine.

Q. And that, as you indicated, that doorway and that stairway does not lead to any of the places of business shown on the main floor there, as shown on plaintiff's exhibit 7? [44]

A. It does not lead to any of these places.

Q. That is, just for the record, by "these places" you mean the dry goods and furnishings and hardware and the dime store and the drugs and the fountain and the groceries, produce and meat, the post office, bank, or the storage room?

A. It does not lead to those spaces.

The Court: Where is the entrance to those downstairs, first floor stores?

A. There is the entrance.

The Court: You're indicating now on the south side of the building?

A. This is the north side.

The Court: Oh, I see; there's another entrance along the north side.

A. There's one here, one here, the small truck entrances on the back, not shown; this is the post office entrance, and there's now a store at that point, Sears Order Office, and there's the bank.

Q. Then to sum it up, this doorway to the mezzanine is the only entrance up to the mezzanine floor?

(Testimony of Chester E. Benjamin.)

A. There's a fire escape, but it's not used as an entrance.

Q. I see; and you said a moment ago that that led to a place of business; is that the beauty salon formerly operated by Mrs. Bessie Dumas? [45]

A. Yes.

Q. And that is the beauty salon operated by Bessie Dumas as the premises described in the lease, being exhibit 15?

A. Yes, this appears to be her lease, a copy of it.

The Court: I'm not too clear on that, now; is the beauty parlor on the mezzanine floor?

A. Yes, sir.

The Court: And the stairway leads up to there?

A. And distributes to her shop and others.

Q. (By Mr. Kelley): To clear that up, that stairway goes to the beauty parlor?

A. It does.

Q. And the beauty parlor is separate and apart from, and on another floor from the rest of the tenants shown on the main floor as shown in plaintiff's exhibit 7? A. Yes.

Q. And the customers of the beauty salon would be using that doorway to the mezzanine?

A. That's the only way they can get up.

Q. That's the only way they can get up and come out?

A. They can come out down the fire escape, and some of them do.

(Testimony of Chester E. Benjamin.)

Q. I see. The Bureau of Reclamation or the government in this case had never removed any snow from the roof of this building that you've called the General Store Building, has it? [46]

A. You're differentiating now between snow and ice?

Q. That's right.

A. No, we do not remove snow.

Q. And on the occasion of your deposition, and have you brought with you now, the records relative to repairs to the roof, gutters and eaves, for two or three years prior to January 28, 1949?

A. I have copies of any such records in existence.

Q. And I didn't understand you when counsel asked you about the overhang of the eaves. What is the situation there?

A. This is a simple overhang where the rafters overhang the wall about 28 inches, and on the outside edge of the end of the rafters are structural hangers that support what we call in the profession a hung gutter, that's a half-round eaves trough from which come down a few downspouts to bring the water down. The over-all dimension outside the gutter is probably about 32 inches, and about 28 inches to the inside.

Q. These eave troughs are adequate for any normal weather problem referred to by counsel, are they not?

A. Any normal weather problem, yes.

Q. Yes, and the winter of January, 1949, and

(Testimony of Chester E. Benjamin.)

the month of January, 1949, in particular, that was one of the most severe winters you had experienced down there in the past ten years? [47]

Mr. Wolff: Before you answer, please; your Honor, I object to that question; if he's going into that matter he's making the witness his own witness, and the witness is subject to cross-examination, of course, and leading questions wouldn't be permitted. I think that was a very leading question.

Mr. Kelley: I didn't intentionally go into new matters.

Mr. Wolff: The severity of the winter is a part of the affirmative defense, and certainly something we didn't go into on direct examination.

Mr. Kelley: I thought that he'd asked about some problems in connection with the roof, if your Honor pleases.

The Court: Yes, I think he did go into that. I'll overrule the objection.

Mr. Kelley: Would you read that question, please?

(Pending question read by the reporter.)

A. Yes.

Q. Now, in that most severe weather there wasn't any method of preventing the eaves troughs from freezing over in the severe weather, was there?

A. No.

Q. And by the way, who built that building?

A. The building was built by the Mason-Walsh-Atkinson-Kier Company for one of their splinter

(Testimony of Chester E. Benjamin.)

subsidiaries, called the [48] Coulee Trading Company.

Q. Is it under the direction and supervision of the government? A. Now it is, yes.

Q. Can you tell the Court how long it has been?

A. I believe the government had that building returned by the contractor in the fall of—I think it was '41, and it might have been '42. Time goes along pretty fast.

Q. In your opinion there's nothing defective in the construction of those eaves troughs, Mr. Benjamin? A. No.

The Court: Is it a wood frame building?

A. Yes, your Honor.

Q. Couldn't you just briefly and generally describe to the Court the nature of the building with respect to its construction?

A. The building is built of ordinary frame construction, 2 by 6 studding, on concrete footing walls. The interior floors are supported on wood piers, wood posts on concrete blocks. The main floor is quite heavily constructed, being what we call car decking, 2 by 6 tongue and groove covered with linoleum. The walls extend up to a series of trusses which support the roof. These are lightly built; we used to call it saloon framing in the old days, sheathed with ship-lap, covered with mineral surface roofing paper. The [49] building is a temporary structure, not finished with plaster, but with ordinary fir-tex or fibre board lining.

Q. By the way, that sidewalk on Roosevelt Ave-

(Testimony of Chester E. Benjamin.)

nue, you've been asked about what is the percentage of the grade?

A. I think 6 per cent; in other words, 6 feet in 100 fall.

Q. 6 feet for every 100? A. Yes.

Q. Did you as a building inspector climb up on that roof or inspect personally the gutters and eaves January 28, 1949?

A. No. I could see that from the ground; I don't have to get up on it.

Q. And you have brought or you have shown to counsel and you have with you all records of any manner, shape or description relative to this building on or about that time?

A. He's seen them all.

Mr. Kelley: That's all.

The Court: Under the circumstances you may ask leading questions, if you wish, Mr. Wolff.

Redirect Examination

By Mr. Wolff:

Q. Mr. Benjamin, you indicated to Mr. Kelley that the government doesn't remove snow from the roof of the building. The fact is, is it not, that the snow melts because of the heat loss through the building roof?

A. I can't answer that question by yes or no. I can explain to you what does happen. [50]

Q. Isn't it a fact there is a substantial heat loss through the roof of that building?

(Testimony of Chester E. Benjamin.)

A. Well, there would be a normal heat loss through the roof and the walls in all directions.

Q. And the snow on the roof melts because of the heat loss, doesn't it?

A. Either that or a rise in outside temperature, or both.

Q. So for those reasons it's never been necessary for you to remove snow from that roof?

A. That isn't the reason. The reason is the snow at Coulee Dam is a very light water content, and isn't heavy enough to worry about.

Q. So you've had no concern about the snow?

A. Not about the snow.

Q. But the ice has bothered you?

A. The ice caused me some concern, because it piles up at the edge of the building, and I have to watch the weight of the snow to prevent it from breaking off the eaves or falling on pedestrians.

Q. That's true most every winter, isn't it?

A. Yes, I think most winters.

Q. And while the 1949 winter might have been a severe one, it didn't materially change the picture as to the ice accumulations on those eaves; it had always been a problem, hadn't it? [51]

A. The problem is not always present in winter. It's present when the temperature reaches a point where the heat loss through the roof melts the snow, causing it to run to the edge, at which minute it freezes; there's where it accumulates along the edge of the eaves on there; it doesn't even reach the gutters, but piles up thick on the roof, some-

(Testimony of Chester E. Benjamin.)

times that deep. It's due to the differential of the outside and inside temperatures that causes it.

Q. And that problem has been present in 1948, 1947, has it not? A. I think so.

Q. And in 1950, this last winter? A. Yes.

Q. As a matter of fact, during this last winter didn't you try some kind of a steam device up there?

A. No, not last winter.

Q. When was that?

A. Tried that prior to 1950.

Q. The year before Mrs. Phillips fell, then, '48?

A. Yes, I think it was around 1948 when I used a steam boiler and attempted to melt the ice from the edge.

Q. How did the winter of '48 compare with the winter of '49 as to severity of conditions?

A. Well, it wasn't as cold, or as much snow, but I had as much trouble with ice due to this differential in the [52] temperatures.

Q. You belong to the Rotary Club there at Coulee Dam, Mr. Benjamin? A. Yes.

Q. Did you in January, 1949, belong to the Rotary Club?

A. I don't believe so. I can't recall, but I think I joined about April, 1949.

Q. Do you know that Mrs. Phillips is a member of the Ladies' Rotary?

A. I believe she is, yes.

Q. Do you know whether she has been active in that organization since January, 1949?

A. Yes, I think she has.

(Testimony of Chester E. Benjamin.)

Q. Just what were her activities? Well, let's put it this way, Mr. Benjamin; I may not make myself clear. Do you know that she's been a member; you've indicated that. When I ask you whether she has been active, what I want to know is whether she has taken an active part and participated personally in the various activities of that organization since January, 1949?

A. I can't answer that question by yes or no. The Rotary Club does not recognize the women. That's entirely aside.

Mr. Kelley: That is a faux pas.

A. What they do is their own business.

Q. Yes. Well, have you had any occasion, then, to observe [53] whether or not she actively participated in the Women of Rotary? Maybe you have not, I don't know.

A. I think she's been in some of the social functions of the women. Sometimes the women give a party for the men, and we recognize them at such times.

Q. You'd be unable, then, to compare her activity in the organization before and after the fall?

A. I couldn't say.

Q. I see. All right. Now, you know, Mr. Benjamin, that the Dumas beauty parlor isn't the only premises on the second floor of this building?

A. Oh, I didn't say they were.

Q. No, I know you didn't. I just wanted to make that clear. A. That's correct.

Q. And we call it a mezzanine, but it's a full

(Testimony of Chester E. Benjamin.)

story, isn't it? There's no open well in the center?

A. Somewhat less than half the total area of the building.

Q. I don't know the definition of a mezzanine, but there's nothing but floor space on the second floor, it's not related to the first floor in any way, isn't that right?

A. Mezzanine is generally a half story or a portion of a story, not a full area over the entire building.

Q. There's no open well area to the first floor?

A. It's a little grander than a balcony.

Q. There's no open area to the first floor? [54]

A. Only a freight elevator.

Q. There's not a railing around the first floor?

A. It's fully enclosed.

Q. The floor fully covers the area except for the opening for the elevator?

A. No, it does not cover the area of the entire building; it covers the complete area of the second floor.

Q. In other words, the floor space on the second isn't as much as on the first floor, but there's no open well as we often think of a mezzanine, as being a glorified balcony?

A. Only a stairway.

Q. What's the square footage on that second floor, if you know? We call it the mezzanine.

A. Well, if you want to do a little quick calculating, it's about two-fifths of 220,000.

Q. 220,000 is the main floor?

(Testimony of Chester E. Benjamin.)

A. That's right.

Q. It's about two-fifths of that. Well, let's see what that is; about 88,000 square feet?

A. I didn't figure it. I'll leave it up to you.

Q. How many square feet in the Dumas Beauty Parlor, do you know?

A. I believe the lease would show that; it's a fairly small section.

Mr. Wolff: That's all the questions. [55]

Recross-Examination

By Mr. Kelley:

Q. What does the lease show?

Mr. Wolff: I think it says 400 square feet, doesn't it, Mr. Benjamin?

A. Just a minute, I'll see.

Mr. Wolff: Paragraph number 1, on the first page, near the bottom of the page.

A. 400 square feet, more or less.

Q. (By Mr. Kelley): Do the Beauty Salon employees clean the entrance to the mezzanine there that you've been talking about?

Mr. Wolff: What was that question?

(Pending question read by the reporter.)

Mr. Wolff: The question should be made more definite and specific as to time.

The Court: Well, we can go into that later.

A. The answer, as the question is worded, is no.

Q. Did they about January 28, 1949, or before?

A. I don't believe they ever do.

(Testimony of Chester E. Benjamin.)

Q. As far as you know?

A. As far as I know they do not.

Mr. Kelley: That's all.

(Whereupon, there being no further questions the witness was excused.)

The Court: Call the next witness. [56]

THOMAS HUBBARD

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you state your name to the Court, please?

A. Thomas Hubbard; full name Thomas William Hubbard.

Q. Where do you live, Mr. Hubbard?

A. Coulee Dam.

Q. What's your work?

A. Powerhouse operator.

Q. Who do you work for?

A. The Bureau of Reclamation.

Q. Have you lived there long, at Coulee Dam?

A. Well, my residence has been there for the past almost ten years, since January 12, 1942. I was in the service part of that time.

Q. This lawsuit, Mr. Hubbard, relates to an alleged fall that Mrs. Homer Phillips had on the sidewalk in front of the General Store Building in

(Testimony of Thomas Hubbard.)

Coulee Dam. Do you know where the General Store Building is? A. Yes, I do.

Q. Are you familiar with the sidewalk in front of the entrance to the mezzanine floor there?

A. Yes.

Q. Calling your attention to January 28, 1949, did you have occasion to notice the condition of the sidewalk in front [57] of that entrance-way?

A. I did.

Q. When did you see it?

A. Well, it was in the morning, probably around approximately 11 o'clock, at which time I came out of the—do you want me to go into the details?

Q. Go ahead.

A. I came out of the Co-Op store with my young daughter, and I thought that the sidewalk was too dangerous——

Mr. Kelley: I object to this.

The Court: Yes, that is objectionable; it will be stricken. Just tell what the conditions were, and not your conclusions.

Q. (By Mr. Wolff): Your opinion as to how dangerous it was isn't proper at this time. Go ahead and tell what you saw.

A. I saw the ice and snow and icicles on the walk at this time, particles of icicles not broken.

Q. You're referring to the area right in front of the entrance to the mezzanine?

A. Yes, and also by the Co-Op store. There's two elevations there to that sidewalk.

Q. Let's see the photo. I want to show you,

(Testimony of Thomas Hubbard.)

Mr. Hubbard, this picture that's called plaintiff's exhibit number 12. On this photo you see a mark "doorway to mezzanine"; is that the doorway you're talking about? [58] A. Yes.

Q. Where is the Co-Op store that you mentioned?

A. Here; that's the entrance to the Co-Op store.

Q. Up to the left, where the sign "Drugs" is?

A. Fountain, Drugs, Souvenirs. That's one entrance to the store.

Q. Is that the one you said you came out of?

A. That's the one.

Q. About 11 o'clock the morning of the 28th?

A. Approximately 11:00 o'clock.

The Court: When you say "here," that's not going to indicate on the record what you mean on the picture. He's indicating the extreme left hand entrance way shown on the picture.

Q. And you identified it as the point where the drug sign appears? A. The drug sign.

The Court: All right.

Q. And you indicated that you saw icicles on the sidewalk? A. Yes.

Q. State just what you saw in regard to icicles on the sidewalk. Well, first, just a moment. Were there any icicles on the sidewalk in front of the doorway to the mezzanine?

A. Right at that particular time when I came out of the door I wasn't—that was far enough out of my—where I wanted [59] to get that I didn't pay any attention right at that particular moment,

(Testimony of Thomas Hubbard.)

when I came from the grocery store. When I refer to this, I am referring to the entire sidewalk from the point where the drug sign is, this way, because there are two different elevations of sidewalk here. The pitch from in here changes for a short distance.

Q. You mean the slope of the walk?

A. Not the pitch of the sidewalk, the slope of the sidewalk running east and west.

Q. Well, is there a particular point where this slope changes, or is it gradual?

A. Well, it starts, I don't know whether you'd call it abrupt or not, but it's west of the entrance of the Co-Op Store, very slightly, where this change in elevation takes place, and it goes down below the entrance to the mezzanine, and the distances there I don't know, but that's the east and west slope.

Q. Did I understand you to say you did have occasion to see the condition of the walk in front of the door to the mezzanine?

A. Yes.

Q. And when did you see that condition?

A. At the time that Mrs. Phillips fell.

Q. Did you see her fall?

A. Yes—no, I'll retract that statement. I didn't see Mrs. [60] Phillips fall. I saw her when she came out the door, and at that particular time I happened to glance down, helping my daughter up a little stairway, and when I looked down to help her up, I heard the scream or the yell—

Q. You saw everything but the fall, the moment before and the moment after?

(Testimony of Thomas Hubbard.)

A. I saw the moment before and the moment after.

The Court: It's time for recess; we'll take a recess now until 1:30.

(Noon recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination
(Continued.)

By Mr. Wolff:

Q. I think we were trying to determine whether you knew the condition of the sidewalk at the point where Mrs. Phillips fell. I might ask you, then, if you can state just where she fell, identify it as best you can. A. It is——

The Court: May I suggest this; you may very likely have other witnesses referring to points on that map. I wonder if it wouldn't be wise to have them make an X and put their initials on it, then no matter how many you have you can identify it.

Q. (By Mr. Wolff): Now, this is the road, you know.

A. This is the street. You wanted me to approximately put a [61] mark there where Mrs. Phillips was?

Q. Identify the place where she fell.

A. The cars are in the way between the sidewalk and——

Q. I might suggest that plaintiff's exhibit num-

(Testimony of Thomas Hubbard.)

ber 7 might give you a better opportunity to make that clear.

The Court: The place where she fell is obscured by the automobiles in that picture, exhibit 12?

A. Yes.

The Court: All right, mark it on the map, exhibit 7.

A. As near as I can tell, it was approximately right in here. I'll initial the point there. It might be inches one way or inches the other.

Q. You put "T. W. H."?

A. Yes, those are my initials.

Q. From your indication it appears to be within the boundaries of the two edges of the door, at least in a north and south direction. Her fall was not outside the point where the side of the door would be, was not down the sidewalk from there?

A. No, it wasn't.

Q. And it wasn't up the sidewalk from the other point of the door?

A. No, it wasn't. Of course, when she fell, of course, her feet sliding out from her could have been past the door——

Q. Which way would her feet be? [62]

A. Her feet were pointing westerly, or down grade.

Q. And in relation to the front wall of the building, explain where this point is. Is it so many feet out on the sidewalk from the wall of the building, or just where is it?

(Testimony of Thomas Hubbard.)

A. Well, I can't show you in this picture here.

Q. Well, state as best you can.

A. It could have been 3 feet, it could have been 4 feet, or 5 feet, approximately between 3 and 5 feet out from the door.

Q. All right, and what time of the day did you see the condition of the walk there?

A. Approximately 11 o'clock, maybe a little before, maybe a little after.

Q. All right, now will you describe as best you can the condition of the ice and snow on the sidewalk at that time and at that point?

The Court: I'm not sure whether this refers to the first time when he came out of the building, or when Mrs. Phillips fell. Which is this 11 o'clock?

Q. Can you answer that, Mr. Hubbard?

A. Well, I saw two different ice conditions, two different walk conditions; when I came out of the store, and also at the time Mrs. Phillips was on the walk.

Q. You mean that the ice condition at the time she fell was different, when she fell, than it was the first time? [63]

A. I didn't come by there the first time. When I helped assist Mrs. Phillips there, when I saw that particular walk at that point there——

The Court: About what time was it when you came out of the building that morning?

A. I don't exactly remember; it was between 10 o'clock and 11 o'clock, because I went to the barber shop.

(Testimony of Thomas Hubbard.)

The Court: Then how much later was it when you saw Mrs. Phillips, when she fell?

A. It was in the neighborhood of 11 o'clock.

The Court: Less than an hour intervened, then, between the two?

A. Yes; as I recall the shop wasn't overly crowded on that particular morning.

Q. (By Mr. Wolff): I'm not sure I understand. You saw the condition of the walk at around 10 o'clock, roughly? A. Yes.

Q. Tell us what that condition was?

A. Well, I don't say 10 o'clock; it's approximately 10 o'clock.

Q. I understand, sure.

A. The walk was in such an icy condition that I didn't want to travel down that particular section of the street; I went around it; I went into the street and went around that section of the sidewalk and came back onto it along here some place, at a point I don't exactly remember. [64]

The Court: If I understood your testimony correctly before, you didn't at that time observe the condition of the walk as to ice and snow in front of the mezzanine door?

A. This point between this door here, we'll say, where you come out of the Co-Op, and down here, it has another change in elevation.

The Court: Well, read that question of mine; see if he can't answer that. See if you can't pay attention to it.

(Testimony of Thomas Hubbard.)

(Last question by the Court read by the reporter.)

A. No, I didn't, your Honor, right at the door. It was beyond the point of the door where I traveled around.

Q. So at the point where Mrs. Phillips fell you didn't see the condition at 10 o'clock? A. No.

Q. All right, when did you first see the condition at the point where Mrs. Phillips fell?

A. When I came up there, when she was on the ice, it was at that time that I saw the condition in front of the door.

Q. And about what time would you say that was?

A. That would be approximately around 11 o'clock.

Q. All right, now tell us what the condition of the ice was around 11 o'clock.

A. There were icicles, broken, apparently they had fallen off [65] or been knocked off, I don't know which, and there was a ridge of ice out from the door that had built up, and it was rough, but it was very slick and glared.

Q. About how high had it piled up?

A. Well, I would say three or four or five inches. It was noticeable, where it had dripped and had frozen at that point.

Q. Was it possible for a person to come out of the mezzanine door without stepping on the icy condition that you've just described?

A. No, it wasn't.

(Testimony of Thomas Hubbard.)

Q. You mentioned that icicles had dripped and frozen. Where did the drips come from?

A. From the eaves troughs, probably originated on the roof.

Q. Can you point out just where this ridge of ice was that you described, in relation to the building itself?

A. Well, it was out from the edge of the building about—this morning he said from 26 to 32 inches. Well, that could be the distance. It could be anywhere within that.

Q. State whether or not it was right at the point where Mrs. Phillips fell?

A. No, it wasn't exactly right on the point, the big ridge of ice, because that apparently is what she fell on. The ice had melted out from the building and ran out, with the pitch of the sidewalk, ran out toward the street and was frozen. [66]

Q. Did it appear to you that pieces of icicles had frozen into this mass on the walk, or was it just drippings of water that froze?

A. No, it appeared to be pieces of icicle, lying around there.

Q. Do you know how long the condition existed prior to 11 o'clock of that day?

A. No, I don't. I have no idea.

Q. Do you know whether it was that way the day before, or the week before?

A. No.

Q. I believe you indicated this morning that you saw Mrs. Phillips just before she fell. Was there anything unusual about her conduct before she fell?

(Testimony of Thomas Hubbard.)

A. No.

Q. She was alone? A. She was alone.

Q. Was she walking fast or slow?

A. No, as I can remember, happening to look up the street, it appeared to me that she was hesitant before she went to step out there, and that being about the time that I looked down.

Q. Do you know just the point where she slipped, or merely where you saw her lying?

A. Merely where I saw her lying.

Q. And after she fell I think you said you heard her cry out? A. Yes. [67]

Q. What did she say, and tell us what happened as you looked up?

A. I don't remember what she said when she cried out. I heard her make the cry, and happening to look up at the time, I saw, I assumed, that she was injured.

Q. What did you do next?

A. I ran up there as rapidly as I could, trailing my young daughter, and tried to give what assistance I could.

Q. And will you then describe just how Mrs. Phillips lay on the ice when you arrived?

A. She was lying on her side, as I recall, with her feet toward the west, down grade, and her clothes were disarranged, and I don't remember who pulled her dress down, or anything, but I know the girls came along at that time and started peeling off their coats to give her what comfort they could, because she was complaining about her

(Testimony of Thomas Hubbard.)

ankle, I believe it was her ankle at that particular time, and the girls wanted to be sure that she was kept warm, and while they were talking with her I went to put in a call for the ambulance.

Q. It was you that called the ambulance?

A. I didn't call the ambulance; Mrs. Ted Atwater was at the phone, and I asked her if she would call the ambulance, that Mrs. Phillips had been injured outside the building.

Q. Do you know whether Mrs. Phillips' body was in direct contact [68] with the ice, or did she have clothes between her and the ice when she was lying there?

A. As near as I can make out from her complaints at that time, she was in direct contact with the ice, and no clothing in between.

Q. What part of her body was in contact with the ice?

A. Well, knees, legs; on that I couldn't say.

Q. Did she indicate what part of her body was suffering from injuries, if any?

A. She was complaining of "my ankle; don't move my leg," or "don't move my ankle." I don't recall, it was one or the other.

Q. Who were the two girls that arrived that you mentioned? Do you know their names?

A. No, I don't. I didn't know the girls at that time.

Q. Do you know who else came upon the scene before she was moved?

A. Yes, Mr. Neuman.

Q. Is that Ernest Neuman?

A. Yes.

(Testimony of Thomas Hubbard.)

Q. A milkman? A. Yes.

Q. Anybody else?

A. And there was a man, I don't recall what his name is, but he is in the audience here. [69]

Q. He's in the room today? A. Yes.

Q. Anybody else that you can describe or name?

A. And Mr. Alberts of the Coulee Dam stores.

Q. Do you know who moved her from the ice?

A. Yes, after I had gotten back out they were in the process of getting her, and I helped carry her into the store.

Q. Do you know that Mrs. Phillips is quite a large woman? A. Yes.

Q. How many men did it take to move Mrs. Phillips from the ice?

A. There were four of us.

Q. All four of you took part in the actual movement? A. Yes.

Q. Where was she taken, then, Mr. Hubbard?

A. She was taken into the store, right at the general entrance of the Co-Op store.

Q. Would you be able to estimate how long she lay on the ice before she could be moved?

A. Oh, it could have been ten minutes.

Q. And she was laying on the floor in the Co-Op store, then? A. Would you repeat that?

Q. She was taken into the Co-Op store and she was laid on the floor? A. Yes.

Q. And how long did she lay on the floor, if you know? [70]

A. I don't know, because there were so many

(Testimony of Thomas Hubbard.)

people around, and the audience so large, that I pulled away from the scene and stood back.

Q. Did you follow the procedure any further from that point?

A. No, all I saw was the ambulance, or the—yes, the ambulance come in a little while later, a few minutes later, back in there, and saw the doctors come in, but I didn't see her removed.

Q. How many doctors came, if you know?

A. There's one that I know of.

Q. One doctor, and did I ask you how long she lay there before she was removed from the floor?

A. I believe you asked me. I think it was probably around ten minutes, approximately about ten minutes.

Q. And did she indicate any suffering while she lay there on the floor?

A. I wasn't there; I don't know.

Q. When did you see Mrs. Phillips next after that?

A. It was quite some time later that I saw Mrs. Phillips. In fact, the first time that I saw her was when you people were at Coulee Dam last fall.

Q. When we came up to talk to her and you to see what the facts were?

A. Yes.

Q. That was in October, wasn't it? [71]

A. In October.

Q. That was the next time you saw her?

A. That was the next time I saw her.

Q. Will you state whether or not she appeared

(Testimony of Thomas Hubbard.)

to have any after-effects of that accident when you saw her in October, 1950?

A. She apparently did at that time. She was limping and walking with a cane, where the first time that I had known who Mrs. Phillips was and saw her she wasn't walking—wasn't crippled nor walking with a cane.

Q. You knew her before you saw her on the ice, then?

A. I didn't know her; I knew who she was.

Q. She didn't walk with a cane then, or limp?

A. No.

Mr. Wolff: You may inquire.

Cross-Examination

By Mr. Kelley:

Q. I believe you said, Mr. Hubbard, that you had lived down at Coulee Dam for the past ten years? A. Approximately, yes.

Q. And in the past ten years the winter of 1949 was the first real cold weather that you experienced down there at Coulee Dam since 1937, wasn't it?

A. I don't know. I know that it was an exceptionally cold winter.

Q. It was the coldest winter since you had been at Coulee Dam? [72]

Mr. Wolff: Object; this is beyond the scope of the direct examination, as to the severity of the weather.

Mr. Kelley: I would think it's proper.

(Testimony of Thomas Hubbard.)

The Court: Well, overruled.

Mr. Kelley: Will you read him the last question, please?

(Pending question read by the reporter.)

A. Yes.

Q. And as a matter of fact, it had the greatest snowfall since you were at Coulee Dam?

A. That's right.

Q. And during that winter of 1949, and the month of January particularly, and more specifically on or about the two or three days preceding January 28, 1949, the snow fell in the daytime and froze at night, did it not?

A. Well, I don't know that you would call it snow. It's a sort of a precipitation condition that we have there that isn't prevalent in most other parts of the country.

Q. Sort of a Coulee Dam mist?

A. Yes, a mist or frost.

Q. Well, in any event it was bad weather conditions when you first took your little daughter and went into the General Store Building there, prior to Mrs. Phillips' fall, isn't that true?

A. Yes. [73]

Q. And as a matter of fact, as you recall, you went in the barber shop around about 10 o'clock or so?

A. Somewhere, approximately.

Q. In any event, maybe about an hour or so before Mrs. Phillips fell?

A. Well, I don't think that it was an hour.

(Testimony of Thomas Hubbard.)

Q. I see. Well, at the time before Mrs. Phillips fell that you went into the General Store, it was snowing at that time?

A. No, I don't think so.

Q. It wasn't? A. No, sir.

Q. Well, when had it stopped snowing, then?

A. I don't recall the time that it had stopped snowing, whether it had been the day before or whether a frost had fallen during the night.

Q. It might have been snowing when you left the house that morning?

A. It could have been, but I don't know.

Q. You just don't have any personal recollection on it? A. No.

Q. But as I understood you to say a moment ago, as you went into the General Store, you went out and around the icy condition that you observed extending from the mezzanine door entrance up to the entrance to the drug store, that's [74] shown under the drug store sign there in exhibit 12?

A. I came out of the store; I didn't go into the store; I came out of the store and went to the barber shop in another building. I came out of the store and around the condition to the barber shop.

Q. I misunderstood you. Whereabouts is the barber shop located?

A. It's just right across the alley from this building here.

Q. The barber shop is in another building other than the General Store Building?

A. The barber shop is right across the alley;

(Testimony of Thomas Hubbard.)

if this were the alley it would be right over here.

Q. You're designating what is marked as Columbine Avenue on Exhibit 7, as this alley?

A. Yes, that drive that's between what they call the recreation hall and the Coulee Dam store.

Q. Well, then I'd better get this straight. About how long were you in the Co-Op Store, the General Store, before you went to the barber shop?

A. I believe that I went—when I came to the store my main objective was getting to the barber shop, and there's a parking area on Fir Avenue here, and I usually park there, being in winter-time it's an easy get-away there, and go through the store, it's customary to go through the store and out the other door over here to this door to go to the [75] post office or any of those other places of business right in the building there.

Q. Well, let me just get this straight; you had left your home that morning, had you?

A. Yes, very shortly before 10 o'clock, or at 10 o'clock.

Q. And by the way, where did you live at that time?

A. 1009 Camas, where I live at the present time.

Q. And by the way, how far is that from Mrs. Phillips' house?

A. Oh, that's roughly, the way we go, a mile.

The Court: That street doesn't mean anything to me; is that in old Mason City?

A. It's all in old Mason City, yes.

(Testimony of Thomas Hubbard.)

The Court: On the same side of the river as this building? A. Yes.

Q. And then you came down and parked your car on this Fir Avenue?

A. Yes, the parking strip is right up next to the building.

Q. The General Store Building? A. Yes.

Q. Then you came into the General Store Building from some entrance on Fir Avenue?

A. Yes.

Q. And you just walked through the store?

A. I just walked through the store. [76]

Q. You had your little girl with you?

A. I had my little girl with me.

Q. And then as I understand it you came out of the entrance from the drug store, under the drug sign? A. Yes.

Q. As you're indicating in exhibit 12 here?

A. Yes.

Q. I suppose that only took you a few minutes?

A. A few minutes.

Q. And then as you came out you observed this icy condition which was on a little lower elevation, as you've indicated, going in a general westerly direction? A. Yes.

Q. And you and the little girl came out on the street, did you?

A. Yes. That was one of the few times there were no cars parked there, and we cut along the edge of the street and came back on down here at

(Testimony of Thomas Hubbard.)

approximately in front of Sears Roebuck or someplace in there.

Q. And that Sears Roebuck isn't shown in this exhibit 7?

A. Well, it would be in this space here.

Q. In any event, your purpose in going out into the street was to avoid this icy condition that you observed——

A. On that steeper incline.

Q. ——on that steeper incline, and particularly in front of the mezzanine entrance that led up to the beauty salon? [77] A. Yes.

Q. And was it snowing then, do you recall?

A. No, it wasn't.

Q. Was there snow on the sidewalk in front of the spot where Mrs. Phillips fell?

A. Where Mrs. Phillips fell there wasn't any snow right at the point. Just toward the street, where it apparently is colder out there, or the drip from the building hadn't melted it, it seemed to me, as I recall, there was just a little dry fluffy snow there, a very small indication of snow.

Q. Do you recall, in fact, that it had begun snowing at 8 o'clock that morning and didn't stop until about 11? A. Yes, I do.

Q. Well, this ridge that you've mentioned, whereabouts did that ridge go from the mezzanine door, that is, the entrance to the beauty shop, how long was that ridge in matter of feet?

A. I don't know, I didn't observe it, but I do remember that it extended on either side, and how

(Testimony of Thomas Hubbard.)

far either side of this mezzanine door I don't recall. You had a condition there that you seem to get more melting from the building on the west part of your building under the mezzanine than you do toward the east, under the general dry goods store. Anyway, out from under the mezzanine. [78]

Q. Just to orientate us with respect to this exhibit 7, can you give us, or did Mr. Benjamin give us, the directions? This Roosevelt Avenue is on the north, is it not?

A. It's on the north, and runs east and west.

Q. That's what I'm getting at. Now, this ridge that you've been talking about, did that run east and west of Roosevelt Avenue, in a general way?

A. Yes, generally it ran east and west, parallel with the eaves.

Q. And about how far from the mezzanine entrance was that ridge?

A. Well, I'm guessing, between 26 inches and three feet, approximately. The exact dimensions I can't give you, but that's an approximated distance.

Q. Oh, yes, you mentioned that some lady said that this morning, didn't you?

A. No; Mr. Benjamin. I heard Mr. Benjamin make that statement.

Q. Well, then, how long was the ridge, just an estimate?

A. I wouldn't know, I couldn't make an estimate, it being so long ago, but as I recall, it ex-

(Testimony of Thomas Hubbard.)

tended below, and more farther below than it did above the door.

Q. And about how wide was the ridge?

A. Well, you had an abrupt start where the water hit the sidewalk, then as the water ran out toward the street, or moved toward the street, it tapered off.

Q. Did you yourself personally actually witness any water drip [79] from any place at any time?

A. Yes.

Q. And whereabouts did you see the drip?

A. From the eaves. It wasn't a fast drip, however, it was very slow.

Q. And I believe you stated you don't know the exact spot that the plaintiff Mrs. Phillips fell, you just know where you saw her lying? A. Yes.

Q. Was she lying full length, was she?

A. Full length.

Q. Her head in the direction of the door?

A. Toward the east, parallel to the building.

Q. Oh, parallel to the building?

A. Parallel to the building. Her feet had slipped down here; anyway, that was the position she was in when I got there.

Q. And you mentioned something about her clothes being in a disarrange. What kind of clothes did she have on?

A. Well, she had a fur coat, and as I recall, for winter conditions, she had galoshes and a dark or black dress; dark dress; I couldn't say whether it was black.

(Testimony of Thomas Hubbard.)

Q. And she had her galoshes on? A. Yes.

Q. And did she have any parcels, or did you observed that?

A. I didn't observe that, no. [80]

Q. Did you notice any parcels around on the ice? A. No, I didn't.

Q. Any packages she might have been carrying?

A. None whatever.

Q. And this spot that you observed her lying on, I believe you stated that was a few feet out on the sidewalk from the entrance to the beauty shop? A. Yes.

Q. And I don't suppose you know just exactly, it might have been two or three or four feet?

A. It could have been anywhere, I will say, within two to five feet. It was within that distance.

Q. And let me ask you this: There isn't any question, is there, that you saw Mrs. Phillips come out of the entrance leading from the beauty salon?

A. No, I saw that.

Q. You saw her come out of the building at that entrance? A. At that entrance, yes.

Q. And at no other entrance in the General Store Building? A. No other entrance, no.

Q. And did I understand you correctly that not even the cars were parked around that area that you observed the icy condition and that you yourself avoided?

A. There were no cars parked there, that being that time of the day and weather conditions as they

(Testimony of Thomas Hubbard.)

were, people [81] apparently weren't out moving around.

Q. I see; it was really pretty bad weather conditions?

A. Yes, it was cold and disagreeable.

Q. And it had been snowing all day for several days, had it not? A. No.

Q. Do you recall that for a fact?

A. No, I don't.

Q. You haven't checked the weather conditions?

A. I haven't checked the weather conditions.

Q. You don't know whether it was or not?

A. No.

Mr. Kelley: That's all, thank you.

Redirect Examination

By Mr. Wolff:

Q. I believe I asked you if Mrs. Phillips could have gone around the icy spot as you did; didn't I ask you that? A. Yes.

Q. And could she have done so?

A. She couldn't have, and get out of the building.

Q. Isn't it a fact, Mr. Hubbard, that what you referred to as snow about 8 o'clock in the morning amounted to a frosty condition on the ice?

A. That's what I——

Mr. Kelley: That I assure you I would object, as leading and suggestive. [82]

The Court: I think it is. You can have him describe it.

(Testimony of Thomas Hubbard.)

Q. (By Mr. Wolff): Counsel has objected to that question, the way I have framed it, so I ask you now if you will describe as best you can just what this was that you were talking about as being snow at 8 o'clock in the morning.

A. Well, I think that he asked me about the snow and I told him that it was a snow-like condition. I don't know whether they call it snow or refer to it as snow, but anyway, it is a condition that we have at Coulee; it appears like snow, yet it is different than the average—than any of the snowfall that we have. It looks like snow upon the surface, yet it's really fluffy and dry, much different than any of our snowfall, ordinary snowfall that we have.

Q. Can you say how deep this fluffiness was on the ice at that point?

A. Just faint, just a small covering.

Mr. Wolff: That's all.

Recross-Examination

By Mr. Kelley:

Q. It wouldn't prevent Mrs. Phillips from seeing the icy condition, of course?

A. No, it wouldn't.

Q. And you observed it yourself, as you stated, with your little girl?

A. Yes, the entire area of the walk. [83]

Mr. Kelley: That's all.

Mr. Wolff: That's all, Mr. Hubbard.

Questions by the Court:

(Testimony of Thomas Hubbard.)

Q. This sidewalk is on the north side of the building?

A. North side of the building, your Honor.

Q. It would be shaded from the sun, then, at 11 o'clock in the morning?

A. I believe at that time of the year it would be shaded the entire day. There might be a few minutes in the morning, but I don't think so.

Q. Do you remember whether the ice was melting at that time, or was it below freezing?

A. It was below freezing at that time.

Q. There wasn't any melt or drip from the eaves at that time? A. No.

Mr. Wolff: I had understood you to say, Mr. Hubbard, that the icicles were dripping at that time? A. Well, I believe I misunderstood.

Q. (By the Court): I think he said he had seen them drip. A. Yes, the icicles.

Q. But not at that particular time.

A. Not at the time when Mrs. Phillips fell. I did observe the icicles. I wasn't following you there; I was thinking you meant under sun conditions.

Q. No, I think you followed me all right. What I was asking [84] you at that time was simply whether if you remember, it was thawing or freezing at that time.

A. Well, it was freezing, but the roof was melting.

Q. Oh, I see. That's a different proposition.

Mr. Wolff: In other words, even though the

(Testimony of Thomas Hubbard.)

weather was extremely cold out, drips were coming off that roof at the point where Mrs. Phillips fell, is that what you mean?

A. Yes, that's what I mean. I mean the weather conditions were such that it wasn't thawing elsewhere other than on that building.

The Court: That's all.

(Whereupon, there being no further questions, the witness was excused.)

THERA F. PHILLIPS

one of the plaintiffs, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your name, please?

A. Thera Fisher Phillips.

Q. You're the plaintiff in this action, aren't you, Mrs. Phillips?

A. Yes, sir.

Q. Where do you live?

A. 600 Aspen, Coulee Dam. [85]

Q. Grand Coulee? A. No, Coluee Dam.

Q. How long have you lived there, Mrs. Phillips?

A. Approximately three years, at the present address.

Q. Have you lived in the Coulee Dam area for any period of time? A. Since 1947.

(Testimony of Thera F. Phillips.)

Q. What's your husband's occupation?

A. He's a representative of the Newport Shipbuilding and Drydocking Company, installing the water turbines at the dam.

Q. And has he been engaged in that work at the dam ever since you have lived there?

A. Yes, sir.

Q. Prior to the accident were you employed?

A. No, sir.

Q. You were a housewife? A. Yes, sir.

Q. What was the date upon which you allege you fell at Coulee Dam?

A. The 28th of January.

Q. Nineteen—— A. ——forty-nine.

Q. And were you living with your husband at the time? A. Yes, sir. [86]

Q. At the home you've indicated?

A. That's right.

Q. Do you have any children?

A. I have two.

Q. We have two?

A. We have two; I'm sorry.

Q. And how old are they, Mrs. Phillips?

A. Now, the older one, the eldest one, is 17; the youngest one is 16.

Q. So in January, 1949, they were two years younger?

A. That's right. The older one would have been 15, and the younger one 14.

Q. Calling your attention to the 28th of January, 1949, Mrs. Phillips, will you state what your

(Testimony of Thera F. Phillips.)

business was in the General Store Building on that day? Why did you go there to the General Store Building on that day?

Q. I was not in the downstairs of the General Store, I was upstairs.

Q. You were on the upper floor?

A. They make quite a difference in that.

Q. We've referred to that as the mezzanine, here. A. I was there, yes.

Q. And when did you go into the building on that date?

A. May I state that I went into the building, I had an appointment at 10, being late calling, I went in around half past [87] 10, quarter to 11; I had to come out of there and wait for another appointment, due to my lateness; came out of there approximately half past 11. I had gone there to have my hair rinsed for the night.

Q. You were late in making your appointment?

A. Yes, sir.

Q. And were you late in getting out for your appointment?

A. No, they got me out approximately almost on time.

Q. Were you due somewhere else?

A. Not until that evening, no, sir.

Q. Were you supposed to have been out of that appointment earlier to meet somebody?

A. I should have been there at 10, and I wasn't there until 10:30.

(Testimony of Thera F. Phillips.)

Q. You were only late in arriving for your appointment, then, not in leaving?

A. That is correct.

Q. Where were you going as you left the building? A. Home.

Q. For any particular purpose?

A. Yes, sir, that's where I live.

Q. Well, did you have any particular plans at home that you expected to take part in?

A. Not until that evening, no, sir.

Q. Well, what was your purpose, then, in going to the General [88] Store Building?

A. I went to have my hair rinsed. It was charter night for the Rotary Club, and I wanted to look a little presentable.

Q. Did you have your hair rinsed?

A. Yes, I did. ,

Q. Who took care of your hair?

A. Mrs. Dumas' operator, a Mrs. Ruth Thomas.

Q. In Mrs. Dumas' beauty shop on the second floor or what we call the mezzanine of the General Store Building? A. Yes, sir.

Q. Was Mrs. Dumas there herself?

A. Yes, sir.

Q. Do you know what places of business occupied the second floor of that building at that time?

A. I'm not at all certain as to all of them. I know some of them.

Q. Well, state the ones you know about.

A. There was the National Park Service, the beauty shop——

(Testimony of Thera F. Phillips.)

Q. The National Park Service of the Federal Government?

A. That is correct; the beauty shop, and that was all other than a hall in the back that was rented occasionally to organizations.

Q. As you went into this building you approached through the doorway we've discussed here as the entrance to the mezzanine? [89]

A. Yes, sir.

Q. That's a double door, isn't it?

A. Yes, sir.

Q. And just inside the door is there a landing?

A. Oh, mayhaps a couple of feet, just enough to stand inside the door. In inches I wouldn't know.

Q. Is there anything else in there except the stairway? A. No, sir.

Q. What was the condition of snow and ice just outside the doorway when you went in?

A. Terrific.

Q. Well, explain that.

A. It was in a terrible state.

Q. You tell us so that we will understand.

A. Where the water had dripped, apparently, from the roof it had frozen in a ridge; there had been icicles knocked off, they were imbedded in the ice, and it was dangerous. I was well aware of it, and very careful.

Q. Had the condition changed when you left the building? A. No, sir.

Q. It was the same as when you went in?

A. Yes, sir.

(Testimony of Thera F. Phillips.)

Q. Was there any other way for you to leave the building than the one you did leave by?

A. No, sir. I didn't know of the fire escape. [90]

Q. Do you mind telling how much you weighed at that time? A. The same that I weigh now.

Q. How much is that? A. 240.

Q. And how old are you? A. I'm 46.

Q. So you were 44 at the time of the accident?

A. That's correct.

Q. What were you wearing for clothing at the time of the accident?

A. I don't understand that, directly.

Q. What clothing were you wearing?

A. You mean the regular clothes? I had my regular clothes, a dark dress, my fur coat, galoshes over low heeled shoes, and I had my hair tied up when the accident happened.

Q. Did you have any parcels or bundles?

A. No, I hadn't been in the store.

Q. Do you have the galoshes and the shoes here that you were wearing?

A. Yes, sir. The galoshes have been worn since.

(Whereupon, the galoshes were marked Plaintiff's Exhibits Nos. 18 and 18-A for identification.)

(Whereupon, the shoes were marked Plaintiff's Exhibits Nos. 19 and 19-A for identification.)

Q. (By Mr. Wolff): How long had you had the galoshes that you [91] were wearing, Mrs. Phillips?

(Testimony of Thera F. Phillips.)

A. They were purchased before Christmas of that year.

Q. Showing you plaintiff's exhibits 18 and 18-A, can you state what these are?

A. They're galoshes.

Q. Are they the overshoes you just mentioned you were wearing? A. Yes, sir.

Mr. Wolff: We move their admission into evidence.

Mr. Kelley: No objection.

The Court: They will be admitted.

(Whereupon, Plaintiff's Exhibits Nos. 18 and 18-A for identification were admitted in evidence.)

Q. (By Mr. Wolff): Now, showing you plaintiff's exhibits 19 and 19-A, Mrs. Phillips, can you tell us what they are? A. They are my shoes.

Q. Are they the shoes you were wearing at the time you fell? A. Yes, sir.

Mr. Wolff: We move their reception into evidence.

The Court: They will be admitted.

(Whereupon, Plaintiff's Exhibits Nos. 19 and 19-A for identification were admitted in evidence.)

Q. (By Mr. Wolff): Have the galoshes been worn since the accident?

A. Yes, sir, I wore them the following year, practically the whole—any time that I went out. [92]

(Testimony of Thera F. Phillips.)

Q. Will you describe to us as fully as you can just what happened from the time you left the entrance doorway until you fell?

A. From the time I left——

Q. That's a short span of time, but I want you to describe it as fully as you can.

A. From the entrance of the building to when I fell?

Q. That's right. Did you come out with your right foot or left foot?

A. I stopped at the foot of the stairs to tie up my hair, put my scarf on, looked at my watch to see if it was time for my daughter to come home from school, stepped on the sidewalk, and the next thing I knew I was on the sidewalk.

Q. Which foot gave 'way on you?

A. My right one.

Q. Is that the one that was injured?

A. Yes, sir.

Q. You say it was time for your daughter to be home from school?

A. I was looking to see if it was time.

Q. Was it? A. Not quite.

Q. How much time did you have?

A. I realized she was either just ahead of me, or had not left the building, and instead of waiting for her I started home. [93]

Q. State then your position as you lay on the ice after your fall.

A. I was flat on my back when I became conscious of where I was. I tried to get up, and I

(Testimony of Thera F. Phillips.)

couldn't, and I called for help. My clothes were up 'way above my waist, and it was most embarrassing. I was laying on the ice. My clothes being up it was very uncomfortable, it was mighty cold. When help finally came they put coats over me to keep me warm, but nothing under me.

Q. Who was the first person that came to you?

A. The first one I have any recollection of was Shirley Johnson holding my head.

Q. Were you suffering any pain at that time?

A. Intense.

Q. Just what was the pain, and what parts bothered you?

A. From my knee down I didn't feel as if I had any leg other than just a tremendous ache.

Q. All the way down from the knee?

A. Yes, sir.

Q. And did you suffer any other pain or suffering?

A. My head, when I bumped it on the sidewalk, but my leg overpowered that; it hurt so bad I didn't think I could possibly stand it.

Q. And your head was bumped when you fell?

A. Yes. [94]

Q. Your leg from the knee down?

A. It bothered; at the time I didn't know if it was my knee, my ankle, or what; it was just an intense pain.

Q. How long before anyone came to you?

A. In minutes, I don't know exactly. It wasn't too long.

(Testimony of Thera F. Phillips.)

Q. Did it seem long to you at that time?

A. It seemed ages.

Q. Did you see anyone in sight that you could call to?

A. No, only a woman that came out of the door, and she vanished. I don't know where she went. She ran when I called.

Q. Did you call her? A. I called.

Q. Did she come?

A. She didn't. She ran into the store.

Q. How did Shirley Johnson happen to come?

A. That I don't know, sir. School was out; she was going that way for the lunch hour.

Q. Do you know whether the icicles were dripping at that time?

A. I know it felt rather damp on the ice. I could have been pure cold.

Q. Your body was in direct contact with the ice?

A. Yes, sir.

Q. How much of your body?

A. From my hips half way down my thighs. [95]

Q. You were laying on your back?

A. Yes, sir.

Q. And who else arrived before you were removed from the ice, Mrs. Phillips?

A. There was a number of people. I couldn't say how many. People I had never seen before.

Q. Quite a crowd gathered around?

A. Yes, sir.

Q. Did their presence have any effect upon you?

A. They made me more uncomfortable by throw-

(Testimony of Thera F. Phillips.)

ing coats on top of me and just leaving me lay there on the ice.

Q. And did the fact that part of your body was uncovered in the presence of these people have any effect on you?

A. Well, naturally it was most embarrassing, and when I tried to pull down my dress they pushed me back on the ice and told me to lay still.

Q. Where were you taken when you were taken off the ice?

A. Into the Co-Op store, and laid on the floor.

Q. Do you know how long you were there?

A. I would judge ten or fifteen minutes, before the ambulance came.

Q. Did a doctor arrive? A. Two of them.

Q. Two doctors? A. Yes, sir. [96]

Q. Do you know their names?

A. Dr. Eugene Wiley and Dr. Dudley Wiley.

Q. And what, if anything, did they do when they arrived?

A. Dr. Eugene Wiley looked at my foot. I remember asking "It's broke, isn't it?" He said "I don't know what else." He and Dr. Dudley picked me up and put me on the stretcher. He removed the overshoe, but he couldn't get off the other shoe at that time.

Q. Did anyone assist them in picking you up?

A. Not that I know, sir. They may have. I was in such pain I don't remember.

Q. Who picked you up from the ice and took you inside?

(Testimony of Thera F. Phillips.)

A. I couldn't tell you their names.

Q. Did your removal from the ice into the building cause you any discomfort?

A. Well, yes, sir, it wasn't comfortable, and they left my feet dangle in the air from the knees down, and the pain was excruciating.

Q. State just what pain you suffered at that time, if any. A. The pain from my foot.

Q. An other pain?

A. Not that I was conscious of, no, sir.

Q. Did they give you anything before they moved you from the ice? A. No, sir. [97]

Q. To calm down your feelings or to help the pain? A. Not a thing, no, sir.

Q. When you were removed from the store onto the stretcher and into the ambulance were you given anything? A. No, sir.

Q. Did the movement of your leg or your foot, as you have indicated, they were left to dangle——

A. Not when the doctors picked me up.

Q. That wasn't permitted when the doctors picked you up?

A. Before, when I was picked from the sidewalk and carried into the building, yes. When the doctors picked me up, no.

Q. And where did you go from the floor of the Co-Op Store? A. To the hospital.

Q. The Coulee Dam hospital? A. Yes, sir.

Q. And what happened there?

A. Well, they took me into the X-ray room, X-

(Testimony of Thera F. Phillips.)

rayed my foot, took me then to the cast room and eventually set it, put on the cast.

Q. Were you given any——

A. I was given sodium penathol. It didn't put me to sleep. I was given four spinal injections before the leg could be set.

Q. About how long was it after the accident before you were given this sodium penathol? [98]

A. That was a little after 12. The noon whistle blew just as I went into the X-ray room.

Q. Do you know the time you fell?

A. Approximately 11:30. My watch said 11:26.

Q. And through the use of those drugs were you relieved temporarily of pain?

A. No, sir. I was made very ill.

Q. You were very ill, you say? A. Yes.

Q. Will you explain that?

A. I am allergic to all anesthetics, and unable to take them.

Q. Did you explain that to the doctor?

A. Yes, sir, and he did not give me morphine, due to that.

Q. So at that time the ankle was set?

A. Yes, sir.

Q. And what happened next?

A. I was put in the hospital room and kept there in bed two weeks.

Q. Were you given anything to help your pain and suffering during that two weeks?

A. Yes, sir, it was prescribed for me to take it.

Q. You did take something?

(Testimony of Thera F. Phillips.)

A. Yes, sir, something.

Q. And you were in the hospital then two weeks, you say? A. Two weeks, yes, sir. [99]

Q. How did you get along in the hospital during that two weeks' period? Did you rest easily?

A. Well, I thought I did, very easily, but from the reports evidently I didn't. They kept me under opiates of different sorts and I was not very rational.

Q. Did you find out later that you had done things that you didn't realize you were doing?

A. Yes, sir; most embarrassing.

Q. Who told you about those things?

A. The nurses, and friends who had called to see me.

Q. Do you know now what they were?

Mr. Kelley: I don't see the materiality of this, of course, if your Honor please.

Mr. Wolff: I think she's entitled to show what she went through as the result of this accident, unless it's admitted.

The Court: Well, I wonder if it wouldn't be hearsay, unless she remembers it?

Mr. Wolff: Oh, yes, I agree to that, unless she knows of her own knowledge some way.

The Witness: Would it be permissible to state an incident?

The Court: Well, I think she could tell the condition that she was in. I don't know—a person during the time they were unconscious, they wouldn't have pain and suffering, but I suppose the experi-

(Testimony of Thera F. Phillips.)

ence of being rendered [100] unconscious would be unpleasant. At any rate, she can tell from her own experience what she remembers.

A. Well, I was not unconscious the entire time, to my knowledge.

Q. (By Mr. Wolff): Tell your experience.

A. I was just dull and dazed. At the time, I had been made mother advisor of the Rainbow Girls. The worthy advisor would come to me for instructions. I would tell her one thing. My daughter would come in to verify it; I would tell her another. I was unconscious of contradicting myself. That is why I was being embarrassed.

Q. That was typical of the entire time in the hospital?

A. Yes, sir, and afterwards, while I was at home. I was in bed then five weeks at home.

Q. Did the doctors apply a cast to your foot?

A. Yes, sir.

Q. Can you describe the cast?

A. Well, it was a very clumsy, lumbering cast that reached to the knee. The toes, the very tips of the toes were out, and the rest of the foot was completely encased.

Q. Were you able to move your leg?

A. No, sir.

Q. Could you move it from the hip?

A. No, sir, I was instructed to leave it perfectly still, just wiggle the toes. [101]

Q. Were you in bed? A. Yes.

Q. Was your leg strapped up at all?

(Testimony of Thera F. Phillips.)

A. No, sir, it was raised on pillows from the hip.

Q. Were you able to leave the bed at all during the fifteen day period? A. No, sir.

Q. And when you went home, what was your condition as to your mobility and so on?

A. I was taken home in the ambulance, put into a hospital bed, and stayed in that bed five weeks. Twice I was removed from the bed and taken in the ambulance to the hospital during that time, and had a new cast put on, and then sent back and put in bed again.

Q. Did you have any difficulty in these removals back and forth?

A. They sent the internes or stewards down for me, and with the help of a friend and my husband they got me in and out of the ambulance.

Q. Was it comfortable for you, or not?

A. Very, very uncomfortable.

Q. State just what the discomfort was?

A. The Ambulance was very inadequate; it was cold; the stretcher I was put on was not very comfortable; there were several times at the hospital I was nearly dropped from it; [102] it made me very uneasy when they put me on the stretcher.

Q. You mean the people at the hospital nearly dropped you?

A. Yes, sir, they were young men, and I am heavy. It was very difficult for them.

Q. Did the leg bother you during those periods?

A. The leg from that time, the day it was hurt, has never stopped hurting.

(Testimony of Thera F. Phillips.)

Q. Was it any more pronounced?

A. I suppose so.

Q. Will you explain?

A. The pain at that time was intense. As I said before, when I would go in to have these casts put on it was most miserable, it was agonizing. When they put on the last one and sent me home they told me then that the leg wouldn't be too bad, but it has constantly hurt. I can't say that it's as bad as it was; I'm maybe getting used to it. It still aches.

Q. When was the second cast removed, Mrs. Phillips?

A. I couldn't give you the exact date. The first cast was removed about four weeks from the accident. It was two weeks, approximately, after that, ten days to two weeks that they removed the second one.

Q. Around seven weeks after the accident that the second cast was removed?

A. That would be about right. [103]

Q. And what was done with your foot or leg at that time, by the doctor?

A. X-rayed, and another cast put on.

Q. Put a third cast on? A. Yes, sir.

Q. And describe that cast as best you can.

A. It was just the same as the one they had on before.

Q. For size and weight? A. Yes, sir.

Q. Did they do anything to assist you to walk, by that time? A. No, sir.

(Testimony of Thera F. Phillips.)

Q. Did they ever use walking irons or anything like that?

A. They put a walking iron on the bottom of the cast and put me on crutches, with instructions not to bear any weight on the walking iron.

Q. So in addition to the third cast you were provided with an iron on your leg? A. Yes, sir.

Q. And how long did you have to handle that third cast and iron?

A. That didn't come off until approximately the middle of May.

Q. Of 1949? A. Yes.

Q. How many casts altogether have you had on that ankle?

A. Four or five, I don't remember which. Maybe more. I think [104] there were five.

Q. And it was the middle of May when all the casts and irons were removed?

A. Yes, and then a bandage was put on.

Q. Well, when you got rid of the cast were you able to walk by yourself? A. No, sir.

Q. State what your condition was then?

A. I was forced to use crutches, and I used crutches until late in the fall, then to a cane.

Q. When you left the crutches and started walking on the cane did you get along pretty well and comfortable? A. No, sir.

Q. State just what the condition was?

A. I would just totter; I would be very unsteady on my feet. I didn't fall, with the cane, but I have

(Testimony of Thera F. Phillips.)

tripped without it. I have fallen without my cane. I have tried to do without it.

Q. I see you have a cane here in Court today, Mrs. Phillips. A. Yes, sir.

Q. Why do you use it?

A. Well, if I don't I'm liable to fall. I have tried not to use it.

Q. Is it your feeling of insecurity without it that causes you to fall? [105]

A. Not only my feeling; I actually fall.

Q. Do you have any disability in that ankle at this time?

A. I can't move my ankle but very little.

Q. Would you exhibit to the Court what you can do with the ankle, or cannot do with the ankle?

A. Yes, sir.

Q. Please do that, either by standing or sitting, whatever way you think you can best show.

A. Well, do you want it on the floor, or up?

Q. You go ahead and show the Judge what you can do as to the condition of the ankle.

A. I can move it toward me, and down, that is about all I can get it down, and sideways, that is the limit of it. It's stiff on this side.

Q. Do you mean you have such pain when you try to move it?

A. I mean it is stiff; I cannot move it.

Q. Has there been any change in the size of the calves of your legs, Mrs. Phillips, since the accident? A. Yes, sir.

(Testimony of Thera F. Phillips.)

Q. Will you exhibit to the Court any change there may be?

A. This leg I think you'll find through the calf is an inch, at least, smaller than the left leg.

Q. And is there any change, Mrs. Phillips, in the size of the ankle itself?

A. Approximately an inch and a half to two inches. At times, [106] more.

Q. Which leg is larger or smaller?

A. The right leg is the largest.

Q. It's swollen in through here?

A. Yes, sir.

Q. On the right side, just below the bump where the ankle would be? A. Yes, sir.

Q. Have you measured it, or had it measured?

A. Yes, sir.

Q. And you say the calf is one inch smaller?

A. Yes, sir.

Q. And the ankle is how much larger?

A. From an inch and a half to two inches.

Q. When was it you last checked those figures?

A. The exact date I do not know; it hasn't been too very long ago.

Q. Well, the last few days, or a month, or a year ago?

A. Oh, it's been the last month or so. The last three months, perhaps.

Q. And you feel that that's the condition now?

A. Yes, sir.

Q. Well, Mrs. Phillips, I believe you stated that

(Testimony of Thera F. Phillips.)

you were mother advisor to the Order of Rainbow Girls at that time?

A. That is correct, at that time, sir.

Q. Just state what such an organization is, briefly. [107]

A. It's an organization of young women from 13 to 20, who were under my supervision at that time.

Q. You were their supervisor?

A. That is correct, sir.

Q. Had you just been elected to that?

A. Yes, sir.

Q. When were you elected to that?

A. The beginning of January.

Q. 1949? A. Yes, sir.

Q. What effect did this accident have upon your carrying out the pleasures and the duties of that position?

A. I voluntarily resigned, and was rejected. It forced other members of the Rainbow Board to take over my duties and perform them for me, other than bookwork, until such time as I was able to go back. I went back, as I felt a duty to the young people there, with my leg in a cast, and on crutches.

Q. When did you go back to your duties with the Rainbow Girls?

A. It must have been about the end of March or the beginning of April meeting.

Q. 1949? A. 1949, yes.

Q. So you were out for about four months?

(Testimony of Thera F. Phillips.)

A. That is correct, sir. [108]

Q. Had you been connected with the Rainbow Girls for some time past?

A. No, sir, not as an adult. Other than the mother advisor and the advisory board, there are no additions connected with that.

Q. What other activities had you engaged in prior to your accident?

A. I was vice grand of the Rebecca Lodge in Grand Coulee; forced to resign due to the fact I couldn't climb the steps.

Q. What is the Rebecca?

A. Auxiliary of the Odd Fellows. I was at that time membership chairman of the League of Women Voters. I was Ways and Means Chairman and Program Chairman as well as musician of the Women of Rotary. I couldn't continue that.

Q. What is the vice grand of the Rebecca?

A. Next to the presiding officer.

Q. Were you able to go back to the Rebecca Lodge?

A. I have never been able to go back.

Q. Will you state the reason why?

A. I cannot climb the steps.

Q. Are they on the second floor? A. Yes.

Q. Of what?

A. The lodge hall in Grand Coulee. It's a long flight of [109] stairs.

Q. Did you participate in any church activities at the time of the accident?

A. I had at one time, yes, sir.

(Testimony of Thera F. Phillips.)

Q. Were you at the time of the accident?

A. No, sir, not at the time of the accident. I'm not able to sit in the church on those pews at this time. There's no place for my foot; I can't keep it on the floor the length of the service.

Q. What effect has your accident had upon your activities with the League of Women Voters?

A. I'm not able to attend.

Q. Why can't you?

A. They have them in homes, and most homes have steps that have to be climbed to get in and out. I have a dreadful time. I've had a hard time today. I'm unable to drive a car; I have to wait for someone to come for me.

Q. Did you drive a car before the accident?

A. 22 years, yes, sir.

Q. You and your husband had a car?

A. Yes, sir.

Q. And you drove it? A. That's correct.

Q. Did you participate in the Eastern Star organization?

A. Yes, sir, just committee and kitchen and things of that [110] sort that necessitated me being on my feet.

Q. Were you active in their activities?

A. Yes, sir; to that degree.

Q. What activities did you engage in?

A. The kitchen, the serving, and the cooking.

Q. And were you able to continue that?

A. No, sir.

Q. And why not?

(Testimony of Thera F. Phillips.)

A. I haven't been able to do it at home, either. I can't stand on my feet so long.

Q. I believe you referred to the Women of Rotary?
A. Yes, sir.

Q. You said you were program chairman?

A. Yes, sir.

Q. And musician?
A. Yes, sir.

Q. Do you still do those things?

A. No, sir.

Q. And why not?

A. It's too difficult to get around; I have no way of going and coming.

Q. What musical instrument did you play, or did you sing?

A. I did both; I played the piano and sang.

Q. And can't you play the piano now?

A. Only sitting sideways on a stool. If there's a bench it's [111] very uncomfortable. I cannot use the pedal on the right foot.

Q. Now, about the automobile, did you have any particular activities that you followed with the automobile before the accident? What was your routine with the car? Has it been changed at all?

A. Yes, sir. The car had always been at my disposal. It still is, but I can't use it. We bought a new car thinking perhaps I could drive it, using the opposite foot. It was impossible.

Q. It doesn't have a clutch pedal in it?

A. No, sir.

Q. You thought by using the wrong foot——

A. Yes, sir, but it's impossible.

(Testimony of Thera F. Phillips.)

Q. You must use the right foot, you find?

A. That is correct.

Q. Were you of any assistance to your husband with the automobile before the accident?

A. Well, he's always felt so.

Q. Will you tell us how?

A. Well, I've been able to take him to his work, in an emergency when he was needed at home, any phone calls from the plant, anything where they couldn't get through to him at his office I would go for him. I have taken him places where he needed to go; used my car as a taxi, [112] practically, for everyone in the community that needed to be hauled at one time, and felt I was at their disposal any time they needed me.

Q. Was it your husband's practice to take the car to work?

A. And when I needed the car I would take him in the car and go get him.

Q. Did I understand you to say you don't drive at all any more? A. No, sir.

Q. Has this automobile situation added at all to your expense of living? Has it any bearing upon that?

A. Well, it's necessitated buying a new car; we thought it was a necessity to buy that, to try it, anyway. The only expense incurred other than that would be taxicabs and things, where I would have to call those to take me where I would have to go when he was unable to be away from work and take me.

(Testimony of Thera F. Phillips.)

Q. So that's the way you get around now?

A. That is correct, and instead of taking the students in my car as I have before, I've had to charter busses.

Q. You've indicated that your movement of that ankle is quite limited? A. Yes, sir.

Q. Has it been improving?

A. No, sir. [113]

Q. How long has it been since there has been improvement?

A. It's been—there's been no improvement in it since in October, 1949. There was a series of manipulations on that ankle. From then there's been no other improvement. It was absolutely stiff before that time.

Q. After the Doctors Wiley at Coulee Dam treated your ankle did you make any other effort to procure medical aid? A. Yes, sir.

Q. State what you've done?

A. I was instructed to go to Dr. Adams.

Q. Who told you to go there?

A. Dr. Wiley; he was leaving the area of Coulee Dam.

Q. And did you go through any treatments with Dr. Adams? A. Yes, sir.

Q. State what.

A. Dr. Adams sent me to a physio-therapist. I went to her about two and a half weeks, no help, and he sent me to St. Lukes Hospital and performed what he called manipulations on my ankle. At that time the ankle moved just to the extent that it does

(Testimony of Thera F. Phillips.)

now. Since then there's been no improvement. He said that was all there could be done for it.

Q. Did he tell you you should come back?

A. No, sir, he said I did not have to come back. That was in November, following that treatment.

Q. And have you had any further [114] treatment? A. Not treatment, no, sir.

Q. Do you have any reason to believe that the condition of the ankle will improve from its present state? A. I can only hope so.

Q. I believe you indicated that you were a housewife and did most of the duties around the house?

A. Yes.

Q. Did you have any help from home before the accident? A. No, sir.

Q. You did all your own work?

A. Since I have been at Coulee Dam, yes, sir.

Q. Have you been able to do your ordinary housework since the accident? A. No, sir.

Q. State what limitations were placed upon you because of the accident.

A. Well, I'm not able to—I can't have waxed floors, I slip; it necessitates constant scrubbing, and very dusty. I have to depend on my daughters to do everything that's done except a wee bit of cooking and an occasional washing dishes.

Q. You keep your house now without waxed floors? A. Yes, sir.

Q. Do you have hardwood floors?

A. No, sir. [115]

Q. What kind of floors do you have?

(Testimony of Thera F. Phillips.)

A. Linoleum in the kitchen, and plain floors in the rest of the house.

Q. You used to have them waxed?

A. I had them all waxed, yes, sir.

Q. Who does the cooking now at your home?

A. I cook some, but most of it by my daughters.

Q. How long a period was there before you could cook, after the accident?

A. Well, up until now it's been very limited, and it's only been the last year I have been able to do anything of that sort.

Q. Have you had any hobbies, Mrs. Phillips, other than what you've indicated here?

A. Oh, yes.

Q. What were your hobbies?

A. Ceramics, crocheting, my music, reading, knitting, and my organizations.

Q. Did you do any hiking or fishing?

A. Oh, yes; I consider that almost a necessity, fishing, stream and lake, hiking, and dancing.

Q. What effect has this had upon those activities?

A. Well, we had joined the old-time dance club; it was the only dancing my husband would ever say he enjoyed. Since that time we haven't been able to go. I can't dance. I [116] never was much of a fisherman, or caught much, but I still persisted in going along. I tried to fish, and I really did enjoy it. I haven't been able to do any stream fishing since, it's too rough, I can't walk around, so we purchased a boat, and I can sit in a boat.

(Testimony of Thera F. Phillips.)

Q. You do that now, still fishing in a boat?

A. Still fishing and trolling.

Q. You've indicated in your complaint, Mrs. Phillips, that you were unable to do your family laundry until December, 1949? A. Yes, sir.

Q. And that you were required to make expenditures to have the laundry done, amounting to \$30.12. What are the facts in that regard?

A. That amount that is stated there runs over a period of about the first year. However, I am still compelled to send out the heavy laundry.

Q. Did you actually spend some money to have this laundry done?

A. Oh, yes, sir; I send it to the laundry.

Q. What laundry did you send it to?

A. The Savaday, and Victory.

Q. And how much did you spend?

A. I think over the first year it was approximately \$30.00, until the end of that year. It may have been more or less. [117] The exact figure I do not know.

Q. You've alleged in your complaint that your daughter Thera had been earning money as a theater usherette, is that right? A. Yes, sir.

Q. How much was she earning?

A. I think it was anywhere from \$3.50 to \$10.50 a week.

Q. You've alleged \$5.00?

A. Well, it would average approximately that.

Q. And how was her employment affected by your accident?

(Testimony of Thera F. Phillips.)

A. It necessitated her staying home and doing what she could about the home.

Q. Did she continue to earn \$5.00 a week then?

A. No, sir.

Q. You've alleged you've spent \$19.95 in long distance telephone bills, making calls relating to your medical care and hospitalization. Can you set forth with particularity just what those were and what the need for them was?

A. The first one was to notify my parents. There are two listed for Spokane, that necessitated making trips to the doctors and hospitals, I suppose. That's the only thing I've called Spokane for. The one to Tekoa was to cancel an engagement. The one to Memphis, these to Spokane were all doctors, and to Miss Bennett, the nurse.

Q. Now, Mrs. Phillips, you have indicated that while you were [118] confined to bed you spent \$6.00 to have a telephone extension installed?

A. That is correct.

Q. What was the purpose of that extension?

A. I was compelled to stay in the house by myself at Coulee Dam, there's no help available, there was no one to stay with me all day; my husband had to be at the powerhouse; my children had to be in school, so we had an extension put in the living room right by my bed, in case of an emergency. We had to keep the fires on; it was a little dangerous with the bed clothing around those heaters.

Q. You've indicated you spent \$57.08 for drugs, medical supplies, and cane, and on this document

(Testimony of Thera F. Phillips.)

marked plaintiff's identification number 1 we find a list totaling \$55.52. Will you explain to the Court the need for those items? A. In detail?

Q. Yes, you'd better.

A. In February, the syringe that was on the top, listed, was used on my ear, due to the fact from these ice bruises they seemed to cause congestion, and it was under the doctor's order. The RX were all drugs given me; there's B.C. powder and aspirin, the witch hazel was used to wash and cool my leg.

Q. In connection with the use of a cast?

A. Yes, sir. [119]

Q. Did you explain the B. C. Powder? There was some question about that. What is a B. C. powder?

A. It's a headache powder, used the same as aspirin or anacin. I have one there on the table; used to alleviate pain.

(Short recess.)

Q. You've alleged, Mrs. Phillips, in your complaint that you were required to travel from your home in Coulee Dam to the city of Spokane for medical care and hospitalization on nine different occasions? A. Yes, sir.

Q. At \$5.41 per round trip by bus. Will you state what need existed for these trips?

A. The first trip was to see Dr. Adams, on Dr. Wiley's recommendation. The next trip was to see—and at that time he had me go to see Miss Bennett, physio-therapist, and make arrangements with

(Testimony of Thera F. Phillips.)

her for treatments. The next trip was when I came in and stayed at the hotel for an entire week, with treatments each day. Being unable to obtain a room in Spokane the following week due to these conventions, and the loggers and miners or whatever it was taking up all the rooms, I traveled to Spokane and back each day for seven days, and then I went home on Tuesday, I think it was, and on Sunday was returned to St. Lukes Hospital and came in by bus, since it was not convenient for Mr. Phillips to bring me in. [120]

Q. Had the doctor recommended you take these treatments?

A. Yes, sir, it was under doctor's orders that I took them.

Q. You've alleged you spent \$36.09 in that your clothing you were wearing was damaged to that extent. Can you state what items made up that amount, and what the need was?

A. The dress I had on was ripped and torn under the arms from the strain of the fall. My knee went through my new fur coat, sliding through the ice, took all the hair and fuzz off the back of the coat; my slip was torn, and in actual dollars and cents it may have been more than that.

Q. You know that you spent at least \$36.09?

A. I know I have spent that, yes, sir.

Q. You've alleged you spent \$34.44 because you were unable to wear the high heeled shoes you had before the injury and had to replace them with

(Testimony of Thera F. Phillips.)

low heeled shoes. What were the facts in that regard?

A. Before I was hurt my dress shoes all had what was known as a Cuban heel, a dress heel. I am not able to wear those, and I sold the shoes I had, but it necessitated buying I think four pairs at one time so I could change my shoes. I have to change my shoes several times a day.

Q. How much did you have to pay for shoes?

A. Anywhere from \$7.95 to \$11.95 a pair.

Q. You actually bought some shoes?

A. I bought four pairs; that was the account for three pairs [121] that I purchased at one time.

Q. You've alleged that you spent \$706.56 for hospitalization for a total of 19 days, and required the use of laboratories, operating rooms, and x-ray equipment, and required medical, surgical, and therapeutic treatment, as well as x-rays outside the hospital. The defendants have admitted you paid that money, Mrs. Phillips, but you must prove that all of these things were necessary and flowed from this injury. I want to show you papers marked here for identification as plaintiff's identification number 2. Will you state whether the items shown there refer to the last allegation that we just discussed?

A. Due to my ankle.

Q. Yes, is that correct, is that what's shown in that paper?

A. Yes.

Q. Will you explain what the items there are?

A. In detail, each one?

Q. Yes, why they're related to this accident.

(Testimony of Thera F. Phillips.)

A. Well, the cast, the cast room, and the materials to put on a cast was \$10.00, and the ambulance to carry me to and from the hospital was \$10.00. That is correct.

Q. Is that what you paid? A. Yes, sir.

Q. All right.

A. Here's cast room and cast materials, \$10.00. That is [122] correct. This bill states room service for 11 days at \$10.00 a day, that is correct.

Q. Where was that?

A. At the hospital at Coulee Dam. Ward service, 4 days at \$8.75, that's correct. My cast, the use of the materials, the spinals, the ambulance, that's all correct, sir.

Q. Those all relate to the treatment you've related to the Court earlier?

A. To my ankle, yes, sir. This is another cast.

Mr. Wolff: I probably should move the admission in evidence of each of these as we go along; there are several of them.

The Clerk: Your pre-trial orders covers them as one exhibit.

Mr. Wolff: Then we'll move their admission.

Q. (By Mr. Wolff): And referring next to the papers marked 3, will you state what need existed for the payment of that money?

A. That was paid to Dr. Adams on receipt of his statement to me when I came from St. Lukes Hospital, \$106.00. This is an office call to Dr. Adams, \$10.00. This \$45.50, the Columbia Clinic.

Q. That's the Coulee Dam Hospital?

(Testimony of Thera F. Phillips.)

A. Yes, sir; one for \$134.50, Coulee Dam. One for \$6.00, that was when I was in the hospital for opiates, I think that [123] \$6.00 was a special treatment of opiates for pain. The one for \$28.00 is another one from there, and \$15.00 is another one. These are all from the hospital and Dr. Adams.

Q. And they relate to the circumstances you previously related to the Court?

A. Yes, sir.

Q. Now, showing you the paper marked plaintiff's 4, will you state what need existed for those payments?

A. This \$5.00 was a check that I paid to Miss Bennett, the physio-therapist. One for \$3.00, for treatment; one for \$9.00, that was three treatments, and another one for \$6.00, which was two treatments. This was during the time I came back and forth on the bus and stayed in town.

Q. Now, showing you the paper marked plaintiff's identification 5, why did you pay \$15.00 on that check?

A. This was Dr. Adams' idea; he had a Dr. Small, the anesthesiologist, come up to administer the sodium penathol.

Q. So you paid that separately? A. Yes.

Mr. Kelley: May I see that, please?

Mr. Wolff: I move the introduction in evidence of all the exhibits. How do you identify them?

The Clerk: There's plaintiff's 1, 2, 3, 4, 5, 6 is the clothing bill, I think you've already identified that, and the telephone toll is number 11. [124]

(Testimony of Thera F. Phillips.)

The Court: If you'll look at the pre-trial order, you'll find them listed there, 1 drugs, 2 hospital, 3 doctor, and so on.

Mr. Kelley: They'll have the same numbers here, your Honor?

The Court: Yes.

Mr. Wolff: Have you seen these, Mr. Kelley?

Mr. Kelley: I don't want to see any of those; I'm just looking at this.

The Court: Well, I think I'll admit them in evidence, and then if counsel has objection to any particular items as not being proper, I'll hear them.

Q. (By Mr. Wolff): Did I ask you, Mrs. Phillips, if you knew how long the walk was in its condition——

A. No, sir.

Q. ——before the accident?

A. No, sir, I do not. I had not been up to that place in about a week.

Q. This injury to your ankle, did it relate to the bones of the joint, or to other bones in the ankle?

A. Directly in the joint.

Q. And where is the pain in the ankle now, if any?

A. Right beside the ankle bone, on the outside of the foot.

Q. Does the pain relate to the joint itself, or not?

A. It's hard to differentiate between that. It is sore to [125] the touch, the right ankle.

(Testimony of Thera F. Phillips.)

Q. Does it make any difference when you put your entire weight on it?

A. Well, it feels as if it will not hold me up, then.

Q. What about the pain aspect?

A. It aches just like a toothache.

Q. Does your weight have any effect on the pain?

A. I don't think so. It aches when I'm on it, it aches when I'm off it.

Q. Have you had a complete recovery of the injury to your head?

A. I think so. It hasn't bothered since.

Q. The only permanent disability that you complain about is in the ankle?

A. That is correct.

Mr. Wolff: You may inquire.

Cross-Examination

By Mr. Kelley:

Q. About how long, Mrs. Phillips, were you under Dr. Adams' care?

A. I saw Dr. Adams first in July. It was an examination.

Q. July of 1949?

A. 1950—no, that would be 1949; I'm sorry. It was the same year. I went back to Dr. Adams in October—no, in September, after school opened. He asked me to come in for another examination. October, I think it was October 2, [126] he sent me to St. Lukes. I was there until October 6. In

(Testimony of Thera F. Phillips.)

November, around the middle of the month, I had to come in to Spokane, that was a trip on the bus, to have him remove bandages, and that is all.

Q. As I understand it, Dr. Adams was your physician who last attended you for your ankle?

A. It was the last one that I went to on my own, yes, sir.

Q. And when did Dr. Adams discharge you?

A. I think about November 15th or 18th, around the middle of the month.

Q. Of 1949?

A. Yes, sir.

Q. And as I understand it, that was the only medical treatment that you have had, that is, with respect to your right ankle, is that it?

A. Yes, sir.

Q. Well, maybe I misunderstood you. I thought there was some reference a moment ago to some head injury. You didn't have any medical treatment for any head injury?

A. Only in the hospital. I had several hypodermics to relieve the pain, and I seemed to recover.

Q. That was immediately after the accident?

A. Yes, sir, while I was in the hospital.

Q. Going back to the time of the accident, as I understand it you had lived in Coulee Dam a couple of years before the [127] accident?

A. That is correct.

Q. Had you been there the two preceding winters?

A. Yes, sir.

(Testimony of Thera F. Phillips.)

Q. Do you remember when you first came to Coulee?

A. In February, 1942, and I was there for fifteen months, then I returned to the east coast, and came back in 1947, in February.

Q. And with reference to your sojourn in Coulee commencing February, 1942, for fifteen months, and then your subsequent sojourn commencing in February of 1947, for several years, at least as far as your experience went, this winter of 1949, was the first real cold weather that you experienced in Coulee Dam?

A. No, sir. 1944, I nearly froze to death.

Q. Oh, is that right? Were you there in 1944?

A. From 1942 to 1943—it was around 1942 to 1943, the first year I was in Coulee Dam, is the year I minded the cold more than I had in '49, when this happened.

Q. Well, do you know or don't you whether this winter of 1949, had the greatest snowfall, at least since you were there?

Mr. Wolff: I'll object to that as not the best evidence of what winter had the biggest snowfall. The weather records would show that.

Mr. Kelley: Perhaps counsel didn't hear me say, [128] while she was there.

Mr. Wolff: Same objection.

The Court: Well, overruled, as far as she remembers or knows.

A. As far as I can remember, 1948 was a severe winter as well as 1949. There was a tremendous

(Testimony of Thera F. Phillips.)

amount of snow in 1948, too. I wouldn't say '49 was any colder.

Q. (By Mr. Kelley): All right, is it your recollection that in '49, and particularly in January of 1949, and more particularly for the several days prior to your fall on January 28th of 1949, it snowed all through the day?

A. Did you say prior to the 28th?

Mr. Kelley: Would you read her the question, please?

The Court: Do you understand the question?

A. No, I do not.

(Pending question read by the reporter.)

Mr. Wolff: I don't think that question is specific.

A. I don't see how I can answer that.

Mr. Wolff: It probably should be broken down into several parts.

The Court: Well, you can answer it as best you can.

A. The only way I can answer that intelligently, I think, would be to say that it had snowed several days at different times, but the exact dates I don't recall.

Q. Yes; well, I just meant the two days before your fall. You [129] remember that, at least, don't you?

A. It may have snowed some, but not to any great extent. There had been snow on the ground for a month, maybe more.

(Testimony of Thera F. Phillips.)

Q. Well, going to the day of January 28, 1949, Mrs. Phillips, there isn't any question in your mind, is there, that it started snowing about 8:00 o'clock in the morning and continued up until just about the time you fell on the sidewalk, is there?

A. Yes, there's no doubt in my mind that it did not snow that morning. It was very cloudy; it was overcast; as one of the witnesses stated, there has been this mist in the air that freezes; it has the appearance of snow, but it's a frozen frost. We have that every morning in the winter.

Q. Well, let me ask you, on the morning of your accident was there this mist in the air that had the appearance of snow, and did that natural phenomena occur about 8:00 o'clock and continue until about the time you fell?

A. It didn't continue until the time I fell, if it came down at all, due to the fact I did not look out the window at 8:00 o'clock; I had not been out until after 10:00 o'clock; there was none in evidence then.

Q. Whereabouts is your home——

A. Within two blocks.

Q. ——with reference to this beauty salon in the General Store Building? [130]

A. About two blocks.

Q. And which way?

A. What do you mean, which way?

Q. Was it east or west?

A. Oh, it's one block east and one block south.

Q. As I understood you to say in response to

(Testimony of Thera F. Phillips.)

your counsel's questioning before the recess, you weren't in the General Store at all that morning?

A. No, sir.

Q. But you did your shopping at that General Store? A. No, sir.

Q. Well, whereabouts did you do yours?

A. I do my shopping in the store in Electric City, sir.

Q. I see; so you hadn't been over to the General Store for at least how long before your fall?

A. I haven't been in that General Store since I had returned to Coulee Dam. I never have traded in the store, in the grocery store. I have been into the department store at various times, but not since 'way before Christmas.

Q. Well, there isn't any question, is there, though, that you had this appointment at the beauty salon as you've indicated, for 10:00 o'clock that morning?

A. That is correct; I had a standing appointment at the beauty shop.

Q. And I suppose—I beg your pardon; a standing appointment? [131]

A. A standing appointment. I went once or twice each week, usually twice, and I hadn't been up that week.

Q. You hadn't been out that week?

A. No, sir.

Q. Had you observed the condition of the sidewalk when you had been out the previous week?

A. Well, to remember, no. It's always been in

(Testimony of Thera F. Phillips.)

rather bad condition; there's always snow and ice accumulating there, but at this time it was ice.

Q. I see, and you left your home approximately two blocks from the beauty salon on the morning that you fell, on foot, did you? A. Yes, sir.

Q. And what direction did you take to get to the beauty salon?

A. One block west, or one block east, one block south, and across the sidewalk and upstairs.

Q. Well, did you walk up this sidewalk in front of the General Store Building as far as it led up to the mezzanine entrance?

A. I might be able to show you here, sir.

Q. Yes.

A. When I came in onto the sidewalk, approximately here.

Q. Just show the Court how you came in.

A. Approximately here. It was so bad I took the edge of the [132] sidewalk.

Q. And by "here," you're referring to this Columbine Avenue?

A. No, I'm up on Roosevelt. It's the door to the mezzanine floor, the post office, and the bank. I came in right here; there's a Western Union here. I came in here and turned and went this way, and it was so bad along the building I walked on the edge of the curb until I got here.

Q. You say you came at the northwest corner of the building? A. Yes, sir.

Q. And then you observed the condition of the

(Testimony of Thera F. Phillips.)

sidewalk as it goes in a general easterly direction on Roosevelt Avenue? A. Yes, sir.

Q. And what about that condition?

A. Well, at the time, it was just rough ice. There was no snow in evidence; it was ice. The snow was on the edge of the curb.

Q. How about this mist that looks like snow?

A. If there was any there it must have blown off. There was none that I could notice.

Q. Was this sidewalk from the northwest corner of the building as I'm indicating on exhibit 7, up to the entrance to the mezzanine door, in which you went in, was that a glare of ice, solid ice?

A. It was rough.

Q. It was rough? [133] A. Rough ice.

Q. And did you walk up that sidewalk?

A. I walked on the edge of the street, out here where it would be the curb.

Q. Did you walk in the curb or on the sidewalk?

A. You couldn't walk on the curb, there was too much snow and ice piled along there. I walked right along there as near as I could until I got to the door.

Q. When you say "there," did you walk on the sidewalk? That's all I want to know.

A. Yes, sir, it was the only place I could walk.

Q. You walked on the sidewalk until you got to the beauty salon door?

A. I got up over it, yes.

Q. Was anybody with you at that time?

A. No, sir.

(Testimony of Thera F. Phillips.)

Q. And that time was about, as you've testified, 10:30 or a quarter of 11:00?

A. It must have been approximately 10:30.

Q. And as I understand it, you were about half an hour late for your appointment, is that it?

A. I had to call about it, yes, sir.

Q. And did you experience any difficulty as you walked up the sidewalk there to go into the beauty salon?

A. It was very difficult to keep my feet under me. It was [134] very slick.

Q. And as you described it, the snow and ice was terrific? A. Yes, sir.

Q. And it in your opinion was very dangerous, and you were well aware of it?

A. That is correct, sir.

Q. But you had to get to the beauty salon to have your hair arranged as you indicated for us, because you were going to some function of the Rotary Club?

A. That is correct; it wasn't just "some function"; it was the charter night. An ordinary meeting I wouldn't have gone to it. I don't know whether it means anything to you or not, but ordinarily I wouldn't have attempted it.

Q. Well, Mrs. Phillips, you went on up the stairs to your appointment at the beauty salon?

A. Yes, sir.

Q. And while you were there at the beauty salon you discussed the condition of the sidewalk with

(Testimony of Thera F. Phillips.)

this Mrs. Bessie Dumas, who ran the beauty salon, did you not? A. Yes, sir.

Q. And you told her in brief how icy it was all over and how hard it was to walk in front of the sidewalk in front of her entrance there?

A. We agreed on it, sir.

Q. I mean you did tell her that? [135]

A. Yes, sir.

Q. In fact, during that severe winter that was a favorite subject to talk about, wasn't it?

A. I wouldn't know; I hadn't been out to discuss it before.

Q. As I understood your testimony you came down from the beauty salon about 11:30, was it, or so?

A. Yes, sir; when I looked at my watch it said 11:26.

Q. Oh, yes, and I believe you said you stopped at the entrance and looked at your watch to see if it was time for your daughter to come from school?

A. That is right.

Q. And whereabouts was the school?

A. That's approximately a block east, and maybe a quarter of a block north.

Q. Of the General Store?

A. Of the General Store, yes, sir.

Q. And which daughter was coming from school?

A. Both of them—one of them, I'm sorry, the older one. The younger one was not in high school. I'm sorry.

Q. What time do they get out?

(Testimony of Thera F. Phillips.)

A. About 20 minutes or 25 minutes, I think it is, after 11:00.

Q. And I presume you wanted to, as you stated before the recess, get home?

A. No, I was going to walk down the street with her.

Q. Going to walk in what direction? [136]

A. That would have been one block north, one block west.

Q. Well, in any event you wanted to get home and prepare lunch, I assume?

A. Lunch was prepared before I left.

Q. Were you anxious to meet her at the school building and walk home with her?

A. Not particularly, no, sir. I had no intentions of going to the school building. She would have to pass where I was to go home, and I had planned if she would be coming from the school building that I would just walk down the street with her.

Q. But instead, as you came out of the entrance to the beauty salon you fell?

A. Just as I stepped out onto the ice, yes, a couple of steps.

Q. I don't suppose you know what caused your fall?

A. I would be willing to take my oath that it was that slick ice.

Q. Well, did you stumble, or what was the way you came down?

A. No, sir, I have never been a person to stumble.

(Testimony of Thera F. Phillips.)

Q. I see, you simply felt your feet go out from under you without touching any object, is that it?

A. The first thing I knew my right foot went out, that I was stepping on, and I was down.

Q. And as you've indicated, you were in great pain as you were on the sidewalk? [137]

A. Yes, sir.

Q. I don't suppose you took particular account of your surroundings at that time?

A. I don't quite understand you.

Mr. Kelley: Will you read that question?

(Pending question read by the reporter.)

A. Meaning what? My surroundings at that time?

Q. Where you were sitting on the sidewalk; I don't suppose you noticed the——

A. Well, I was laying on the sidewalk. I couldn't think of anything except the pain in my foot.

Q. Well, that's what I thought, yes. By the way, you had been in and out of that doorway as you've indicated at least once or twice a week for your standing appointment at the beauty salon, for several months prior to your fall January 28, 1949, had you not?

A. Approximately a year or a year and a quarter, yes, sir.

Q. So you were very familiar with the entrance?

A. Yes, sir.

Q. Now then, the exact spot of the accident,

(Testimony of Thera F. Phillips.)

Mrs. Phillips, would be a couple of feet out on the sidewalk from the entrance here that's labeled "doorway to mezzanine" as shown on exhibit 12?

A. You mean the exact spot I fell?

Q. Yes, as near as you could recall. [138]

A. As near as I could recall, I came out of the side here, of the swinging doors, that would be on my left, and the second step I fell down, and instead of laying on one spot, it was so icy I slid, may have slid as much as a foot and a half.

Q. Slid in a westerly direction down Roosevelt?

A. That's right, that's when my clothes went up so high.

Q. But what I was getting at was, where you slipped was only a couple of feet out from the building?

A. Just where that drippage came.

Q. That would only be a couple of feet, would it not?

A. I think maybe two and a half, something of that sort. I couldn't tell you exactly. I don't know.

Q. During the two winters immediately preceding your fall you had been in the beauty salon there, I take it, many times?

A. Yes, sir.

Q. Probably an average of twice a week, as you've indicated?

A. Once or twice a week.

Q. These galoshes that are in evidence here, plaintiff's 18 and 18-A, I think you said you had bought them the prior Christmas, is that it?

A. Just before Christmas, yes, sir.

Q. I suppose you had worn them from then until the time of the accident? [139]

(Testimony of Thera F. Phillips.)

A. That is correct, sir.

Q. Where did you get them, by the way?

A. I couldn't recall.

Q. I beg your pardon?

A. I couldn't recall. It must have been by a catalog. I don't know whether it was Sears or Montgomery Ward.

Q. Did you get them in Coulee Dam?

A. No, sir. I may have bought them in Spokane. I don't remember.

Q. And after Dr. Adams discharged you, November, 1949, from further treatment, did you take any other treatment after that?

A. No, sir, when he told me that that was all he could do for me I rested on his decision. I understood he was a very reputable man.

Mr. Wolff: What was that last?

A. I understood he was very reputable, very reliable, and I took his word for it and had no further treatment.

Q. (By Mr. Kelley): And no further physiotherapy?

A. No, sir.

Mr. Kelley: I think that's all.

Mr. Wolff: I have no further questions of Mrs. Phillips.

(Whereupon, there being no further questions, the witness was excused.) [140]

SHIRLEY JOHNSON

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your name, please?

A. Shirley Johnson.

Q. Where do you live, Miss Johnson?

A. Coulee Dam.

Q. Do you go to high school there?

A. Yes.

Q. What year are you in high school?

A. Junior.

Q. You know Mrs. Phillips, who just testified?

You want to give your answer audibly so they can write it down? A. Yes.

Q. I want to call your attention to the 28th of January, 1949. Do you recall seeing Mrs. Phillips fall at that time? A. Yes, I do.

Q. That was in front of the General Store Building at Coulee Dam?

A. It was in front of the beauty parlor door.

Q. In front of the door on the sidewalk, downstairs? A. Yes, sir.

Q. Where were you when you saw her fall?

A. I was coming down the sidewalk. I was right in front of the store there, in front of the door that goes to the [141] store.

Q. You were in front of what?

A. The door.

Q. That goes into what?

(Testimony of Shirley Johnson.)

A. The grocery store.

Q. Is that called the Co-Op store? A. Yes.

Q. That's in the same building? A. Yes.

Q. So you were a few feet up the sidewalk from where Mrs. Phillips fell? A. Yes.

Q. Were you watching her before she fell?

A. Well, I think I remember her coming down and taking a step and falling.

Q. You feel you saw her place her foot and then fall? A. Yes, sir.

Q. Do you know what she placed her foot on as she fell? A. Sidewalk.

Q. Was it a clean sidewalk, or otherwise?

A. What do you mean, was it icy?

Q. Yes, that's what I want to know.

A. Yes, it was.

Q. It was icy? A. Yes. [142]

Q. Do you know which foot she was placing her weight upon as she fell? A. No, sir.

Q. Did you see her go down? A. Yes, sir.

Q. Did you have occasion to examine the condition of the walk at that point?

A. All I know, it was awful icy and slick.

Q. Can you tell the Court what the condition of that ice was, whether it was smooth or rough or just what you saw there?

A. It was rough and slick.

Q. Describe it as best you can and just as fully as you can.

A. That's all I can say is it was slick and rough.

Q. It was slick and rough? A. Yes.

(Testimony of Shirley Johnson.)

Q. Was it even, or was it bumpy?

A. It was bumpy, I think.

Q. And how big was the bump?

A. I don't know.

Q. Well, do you think it was a six-inch bump, or a——

Mr. Kelley: Just a moment. If your Honor pleases, she can describe what she saw there.

Mr. Wolff: I think she can be considered as a witness that doesn't fully understand——

The Court: I think you may let her describe it. [143]

Q. (By Mr. Wolff): You describe it as best you can.

A. Well, there was snow on there, it was icy, and it was just like this—I don't know.

Q. You are indicating with your hands a wavy condition?

A. It was rough, you know. I don't know how to explain it any better.

Q. Do you know what caused the rough condition? A. No, sir.

Q. Do you know whether the icicles were dripping at the time?

Mr. Kelley: Just a moment; if your Honor pleases, I submit that she can describe what she saw.

The Court: I'll overrule the objection, whether the icicles were dripping.

A. Yes, I guess, I think they were at that time.

Q. (By Mr. Wolff): And do you know where

(Testimony of Shirley Johnson.)

the drips were falling in relation to this doorway that you mentioned?

A. They were falling on the sidewalk.

Q. Do you know how far out on the sidewalk from the door? A. No, sir.

Q. Can you state whether or not they were falling at the point upon which Mrs. Phillips stepped and fell? A. I believe so.

Q. Do you know how far out from the doorway Mrs. Phillips did fall?

A. Well, it was just a step, I'm sure. It might have been [144] more than a step, because there's a little door, you know, sort of a—and you have to take a step to step out, and then you're on the sidewalk.

Q. About a step or so out from there; and do you know how long that bumpy rough condition of the ice had existed prior to this time?

A. No, sir.

Q. Do you know whether it was that way the day before? A. No, sir.

Q. Did Mrs. Phillips say anything as she fell?

A. I can't remember if she said anything as she fell, but after she fell she hollered out in pain, I guess.

Q. What did she say, if you remember?

A. Well, she said to help her, she was hurt, and her ankle was hurting her.

Q. Did she say anything else?

A. Well, we started putting the coats over her. She said "I'm not cold" and she says "I'm cold

(Testimony of Shirley Johnson.)

where the ice is on me." She was on her back, I guess.

Q. Do you know whether the ice was in direct contact with her body? A. No, sir.

Q. You don't know?

A. Can't remember that.

Q. Do you remember whether her clothes were disarranged or not? [145]

A. I think they were; when we put the coats over her we straightened them out, I think.

Q. Who else came upon the scene as you did, if any other?

A. Well, before I got there there was another girl there.

Q. Do you know who she was?

A. I don't know for sure, but I think she was—she's married now; I don't know her name now.

Q. What was her name before, if you know?

A. Eileen Simpson, I think that was her, and she ran down, and when I got there she left, and Virginia Sjoberg was with me, and after we got there Nino Albert and two other guys came up.

Q. Do you know how long Mrs. Phillips lay on this ice before she was moved?

A. Well, it was quite a long time, because we didn't know what to do. It was a good ten minutes, at least.

Q. And was anything put under her during that period of time? A. I don't believe so.

Q. Where was she taken when she was moved from there? A. In the store.

(Testimony of Shirley Johnson.)

Q. In the Co-Op Store? A. Yes.

Q. And do you know how long she lay there before she was moved?

A. Well, I think it was about ten minutes. [146]

Q. Do you know where she lay in the Co-Op Store? A. Yes, sir.

Q. Where? A. In the grocery store.

Q. Was it on a table, bench, floor, a chair?

A. Floor.

Q. Do you know how long after the accident this rough condition of the ice continued?

A. No, sir.

Mr. Wolff: You may inquire of Miss Johnson.

Cross-Examination

By Mr. Kelley:

Q. Whereabouts did you live at the time of the fall, Miss Johnson? A. Where did I live?

Q. In Coulee Dam?

A. I lived up in the townsite.

Q. I beg your pardon?

A. Up in the townsite.

The Court: You'll have to keep your voice up. Do you know some of the girls back here? Just imagine you're talking to them when you answer the questions.

Q. (By Mr. Kelley): How far is the townsite, Miss Johnson, from the General Store?

A. It's about a mile.

Q. And by the way, how old are you, Miss Johnson? [147] A. 16.

(Testimony of Shirley Johnson.)

Q. And at that time whereabouts were you going to school? A. In the high school.

Q. And whereabouts is the high school?

A. Right above the store.

Q. Only a matter of a block or two?

A. I don't even believe it's a block.

Q. Whereabouts were you when you saw the plaintiff, Mrs. Phillips, fall?

A. Right there in front of the store.

Q. You were in front of the General Store? How did you happen to be there instead of school?

A. Well, we got out for lunch.

Q. Oh, school was already out?

A. We'd just gotten out.

Q. And as I understand it, you were walking in a general westerly direction down Roosevelt Avenue? A. Yes.

Q. To go home? A. Yes, sir.

Q. And you arrived at a place in front of the General Store; could you show us in that picture there, exhibit 12?

A. Yes, right here; I was right here.

Q. You're indicating a place under the drug store sign, about? A. Yes. [148]

Q. And as I understand it, Virginia Sjoberg was with you? A. Yes, sir.

Q. And was there anybody else with you girls?

A. No, sir.

Q. And she had been with you ever since you had left the school house? A. Yes, sir.

(Testimony of Shirley Johnson.)

Q. And you were just talking and visiting as you came along? A. Yes, sir.

Q. And what attracted your attention to Mrs. Phillips, when she screamed out?

A. What do you mean?

Q. When did you first see Mrs. Phillips? What attracted your attention to her?

A. Her yell, I guess.

Q. And, of course, you couldn't see Mrs. Phillips from where you were in front of the General Store if Mrs. Phillips was coming down the stairway of the beauty salon, could you? A. No, sir.

Q. And, of course, you couldn't see her as she stopped in the entrance of the beauty salon and looked at her watch, you couldn't see her then either? A. No, sir.

Q. And the thing that attracted you to her is when she yelled, [149] as you put it?

A. Well, yes, but I seen her when she walked out, but when I really looked at her was when she yelled.

Q. You noticed her as she walked out?

A. Yes, sir.

Q. And you noticed her when she yelled, and she fell, as you indicated, just a step from the door, is that right? A. Yes, from the end of it.

Q. Well, when you first saw Mrs. Phillips and you and Virginia Sjoborg were under the drug store sign, did you see that other girl, Eileen Simpson, at that time? A. Yes, sir.

Q. Where was Eileen Simpson?

(Testimony of Shirley Johnson.)

A. Well, we was up there, and she was just a little bit ahead of us.

Q. She was preceding you, going in the same direction down Roosevelt Avenue?

A. Yes, she run down to her at first. I was scared to.

Q. Oh, I see, and Eileen ran down to where Mrs. Phillips was on the sidewalk?

A. Yes, sir.

Q. You didn't notice whether Eileen slipped or anything of that sort? A. No, sir.

Q. Had you gone up that hill that morning to class, to high [150] school?

A. I don't come that way.

Q. Which way do you come?

A. Down the other way.

Q. Well, how come you were walking home that way?

A. I wasn't going home, I was going downtown.

Q. Oh, you were going downtown?

A. Noon, yes, I was going downtown at noon.

Q. And as you stated, you were fearful of going down to Mrs. Phillips right away, is that it?

A. Yes, because she scared me.

Q. And I suppose the incident upset you, too?

A. Yes, it did.

Q. And I suppose at that time you didn't take particular notice of the icicles or anything else right around there then?

A. Well, I knew they were dripping.

(Testimony of Shirley Johnson.)

Q. Well, your attention I take it was directed to that sometime after the accident, was it not?

A. What do you mean?

Mr. Kelley: Will you read her the question?

(Pending question read by the reporter.)

Mr. Wolff: If you don't understand what he means——

Mr. Kelley: She understands. Do you understand?

A. Do you mean after the accident? [151]

Q. (By Mr. Kelley): Somebody talked to you about this accident after it occurred, didn't they?

A. Did anybody talk to me?

Q. Yes.

A. I don't remember anybody talking to me about it.

Q. Well, so you had no occasion to think about the accident until you came into Court here this morning, is that it?

A. No, sir. After she did that, well, it bothered me all day, and I've always asked Thera, her daughter, in school, how her mother was.

Q. I see; you go to the same school with her daughter? A. Yes, I do.

Q. You've known her for some time, I take it?

A. Well, since we were in grade school, I believe.

Q. I see. About how many years would that be?

A. About three years.

Q. And I suppose you're all together in this Rainbow group?

(Testimony of Shirley Johnson.)

A. I don't belong to Rainbows.

Mr. Kelley: That's all.

Mr. Wolff: No further questions.

(Whereupon, there being no further questions, the witness was excused.)

MILDRED HUNTER

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff: [152]

Q. Will you tell the Court your full name, please? A. Mildred Hunter.

Q. Is it Mrs. Hunter? A. Yes, sir.

Q. Where do you live, Mrs. Hunter?

A. At 710 Pine, Coulee Dam.

Q. Have you lived there long?

A. About nine years.

Q. Do you know Mrs. Phillips, the plaintiff in this action? A. Yes, sir.

Q. Have you known her long?

A. Yes, I knew her when she formerly lived at the Dam, but not well.

Q. Are you a close personal friend of hers?

A. Well, not a close friend; just an acquaintance, I would say.

Q. Did you see Mrs. Phillips fall on the 28th of January, 1949? A. I did not.

(Testimony of Mildred Hunter.)

Q. Where were you on the 28th of January, 1949, around 11:30 in the morning?

A. I was across the street from the scene of the accident having lunch.

Q. Where do you work, by the way?

A. At that time I was employed at the Ross Clothing Store, [153] which is in the General Store Building.

Q. On the ground floor? A. Yes, sir.

Q. You were working there. When did you first learn that Mrs. Phillips fell there in front of the mezzanine door?

A. While we were having lunch we saw a crowd gather, and Bobby Newland, a high school boy, came in and told us that it was Mrs. Phillips who had fallen.

Q. Did you ever see Mrs. Phillips on the ice at that point? Did you have occasion to see her there?

A. No, I did not.

Q. Did you ever have occasion to observe the condition of the ice on the walk there?

A. Yes, I walked on it every day.

Q. Did you see the ice on the 28th of January, 1949, at that point? A. Yes, sir.

Q. Describe it as best you can.

A. Well, I would say it was very hazardous to walk on; it was rough, due to the fact mainly that icicles had been either knocked down or fallen and imbedded into that ice, was my main impression of it.

Q. Do you know whether any icicles were dripping that morning about 11:30?

(Testimony of Mildred Hunter.)

A. I don't know. [154]

Q. What time was it that you saw the condition of the ice that morning?

A. Well, I must have passed over it when I went to work at 9:00 o'clock, but I don't recall definitely thinking about it except it was dangerous and you had to be careful walking on it.

Q. Was it any different that morning at 9:00 o'clock than it was the day before?

A. I couldn't say for sure. As I remember it, it was very dangerous all that winter.

Q. And the condition was about the same that morning?

A. Yes, as I remember it.

Q. And after 9:00 o'clock that morning when did you see it next?

A. When I went out to go to lunch.

Q. And what time was that?

A. I'm not positive. I rather think about 11:30.

Q. Just before Mrs. Phillips fell?

A. Yes, it couldn't have been any earlier than that, I don't believe.

Q. And when did you see it again after that?

A. When I went back to go to the store, which would have been an hour. Our lunch hour is an hour.

Q. You didn't go over when the crowd was gathered there?

A. No, I didn't.

Q. And you next saw the ice about 12:30? [155]

A. Yes, sir.

Q. And was it the same as it was at 11:30?

A. I would say so.

(Testimony of Mildred Hunter.)

Q. Did the condition of ice change at any time after that to your knowledge?

A. Not that I can remember, definitely.

Q. That day, at least as far as you know, it was the same, and the next day?

A. I don't remember any change.

Q. Do you know whether there were icicles on the eaves directly over the entrance to the mezzanine that morning at 11:30?

A. I don't believe I could say for sure.

Q. Have you had occasion to be engaged in any activities with Mrs. Phillips before this accident?

A. Yes, sir.

Q. Do you know of any activities that she engaged in that you could tell us about?

A. Well, mainly in her Eastern Star work, she was very active and attended often, which certainly has been changed. I don't believe I've seen her there, oh, I'm sure it hasn't been half a dozen times since the accident.

Q. Do you know why she hasn't attended since the accident?

A. Well, mainly due to the fact that it is hard for her to get out and go anywhere, and there's a great deal of [156] ceremony to the work, and you're standing and sitting several times during the evening, which is difficult for her.

Q. Have you had occasion to see Mrs. Phillips endeavor to get about since the accident?

A. Yes, sir.

(Testimony of Mildred Hunter.)

Q. Will you state her condition when she tries to walk?

A. Well, one instance I can mention, at Rainbow one night she was escorted to the east as an Honor to the past mother advisor, and since they were in formals and so on she tried to walk without a cane when she was escorted up there, and I know for a fact that she had tears in her eyes by the time she got up there, due to the pain.

Q. Do you know whether she drove a car before the accident? A. Yes, I do.

Q. And do you know whether she still drives a car? A. I'm sure she doesn't.

Q. Do you know anything about her Rainbow Girl activities?

A. I have attended Rainbow a few times when she was there, and I do know that she was their mother advisor at the time.

Q. She was the mother advisor at the time?

A. Yes, sir.

Q. And did she continue in that capacity after the accident?

A. For a while. I'm not sure how long.

Q. Immediately after the accident? [157]

A. I don't mean she was active in it; I mean she held the office.

Q. I see. Do you know whether she performed the duties of the office after the accident at all?

A. I don't believe so. I don't see how she could. I didn't attend all those meetings, I wasn't there personally, but I happen to know that she was laid up at home for that long.

(Testimony of Mildred Hunter.)

Q. You know that she was laid up at home?

A. Yes.

Q. Did you have occasion to visit her at home while she was laid up?

A. I didn't happen to, no. I had talked to her on the telephone maybe once or twice.

Q. Do you know whether she played the piano before the accident? A. Yes, I do.

Q. And does she still play the piano?

A. I haven't seen her play since the accident. In fact, I believe she has gotten rid of her piano.

Q. She got rid of the piano? A. Yes.

Mr. Kelley: You're not making a claim for that, are you?

Mr. Wolff: Yes, I think we ought to have a new [158] piano.

Q. (By Mr. Wolff): Do you know whether anyone had been knocking icicles off that roof in front of this doorway the morning Mrs. Phillips fell, do you know?

A. I don't know. I have seen them knocking them off, but I could not swear that it was on that morning.

Q. You have seen the Bureau knocking icicles off that roof from time to time?

Mr. Kelley: Just a moment; if your Honor please, leading and suggestive.

The Court: Yes, I think I'll sustain the objection.

Q. (By Mr. Wolff): How many times have you seen them knocking icicles off that roof?

A. I'm not sure about that, but I have seen men

(Testimony of Mildred Hunter.)

knocking icicles off that roof. Now, I wouldn't swear they worked for the Bureau of Reclamation, but I assumed they did.

Q. What was there about them that made you feel they were from the Bureau of Reclamation?

A. Simply that no one else around there ever did that work, as far as I know.

Q. Did you have occasion to see the trucks they came in, or the uniforms they wore, or anything?

A. They didn't wear uniforms, and I didn't see a truck.

Q. Do you know whether the gutters were filled with ice or not on the 28th of January, 1949, over the point where Mrs. [159] Phillips fell?

A. I don't know.

Q. Have you ever seen the eaves run over with water at that point?

A. Yes, sir. I'm now employed at Sears order office, which is between that point and the bank, and I know that just rain, just ordinary rain, will not carry off in those gutters. You can hardly get in and out our door when it rains very heavy. Now, I don't know whether they leak or whether they run over, but I know they don't carry it off properly.

Q. Are you referring to this particular point where this door is?

A. It would be a few feet from there. It's not the same entrance.

Q. Do you know what the condition is of the gutters over the entrance to the mezzanine door?

A. No, I do not.

(Testimony of Mildred Hunter.)

Q. Do you know whether or not those gutters leak at the joints? A. I don't know.

Mr. Kelley: Well, she——

The Court: Well, I think I'll sustain an objection to that.

Mr. Wolff: That's all, you may inquire. [160]

The Court: Well, I think it's time for us to adjourn here. The Court will adjourn until tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:30 o'clock p.m., the Court took a recess in this cause until Thursday, April 12, 1951, at 10:00 o'clock a.m.) [161]

Thursday, April 12, 1951

(All parties present as before, and the trial was resumed.)

Mr. Kelley: I have no cross-examination of the witness Mrs. Hunter.

(Whereupon, there being no further questions, the witness was excused.)

RAY UPRIGHT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you state your name, please?

A. Ray Upright.

Q. Where do you live, Mr. Upright?

(Testimony of Ray Upright.)

A. Electric City.

Q. And how long have you lived there?

A. About ten years.

Q. What's your occupation?

A. I'm a merchant.

Q. What do you deal in?

A. Groceries, mainly.

Q. What's the name of your store, Mr. Upright?

A. Ray's Grocery.

Q. Is that in Electric City?

A. Yes, sir. [162]

Q. Do you know Thera Phillips, the plaintiff in this action? Do you know Mrs. Phillips?

A. Yes.

Q. Did you have a store in January, 1949?

A. Yes, sir.

Q. The same store? A. Yes, sir.

Q. Are you familiar with the property in Coulee Dam known as the General Store Building?

A. Yes, sir.

Q. And you're familiar with the sidewalk along Roosevelt Avenue adjoining the building?

A. Yes, sir.

Q. Do you know where the entrance to the second floor, called the mezzanine door, is along the sidewalk? A. Yes, sir.

Q. Calling your attention to the 28th of January, 1949, I ask you if you had an occasion on that day to know the condition of the sidewalk in front of the door to the mezzanine stairs?

A. I believe I do, yes.

(Testimony of Ray Upright.)

Q. Will you state what the condition of the walk at that point was?

A. To the best of my knowledge there was from four to five inches of ice from the edge of the building out to nearly [163] the curb on the street. There was a pile of snow along the edge of the road, along the edge of the sidewalk, that was probably from three to four feet deep, and there was tunnels that was cut through the snow onto the sidewalk, and when you walked on the sidewalk you had to be very, very careful. The water would drip off the eaves previous to that, it had been that way, as I remember, about a week, and the water would just keep piling up, and it was smooth ice with probably some ripples in it as the water would run down across it.

Q. Were there any ridges at all along that ice in front of the door? A. Ridges?

Q. Ridges. By that I mean places where the ice may have piled up in rough and uneven piles.

A. Well, as the water would drip off an eave, like up there, and drip down, it would make holes in the ice, and then as it would run down it would just make another coating on top of it; it depending on the temperature naturally made some holes in the ice, just like a faucet when it drips.

Q. Were there any icicles hanging over that point at that time?

A. At that time, I don't know.

Q. And for how long a period before the 28th did this condition exist, if you know?

(Testimony of Ray Upright.)

A. To the best of my knowledge, I was down there probably three [164] times, maybe four times during the week, and each day it just kept getting a little higher, the ice.

Q. A little what?

A. The ice kept piling up a little higher all the time.

Q. And were you there after the 28th of January, 1949, and have occasion to examine the condition?

A. As I remember, I was there the next week, but I do not remember what the condition of the sidewalk was. I know that it was in bad shape for a long time there.

Q. Did you have some particular business in that area that brought you to this General Store Building or along this sidewalk?

A. I do my banking there.

Q. You do your banking there? A. Yes.

Q. That's the bank that's in the General Store Building? A. Yes.

Q. What's the name of that bank, if you remember? What's the name of the bank?

A. Coulee Dam Branch, now.

Q. Seattle First National?

A. Seattle First National branch, yes.

Q. Did Mrs. Phillips patronize your store prior to the time of the accident? A. Yes. [165]

Q. Does she still patronize your store?

A. Yes.

(Testimony of Ray Upright.)

Q. Do you know whether there has been any change in the way she gets around, that is, now, as compared to the way she was before the accident?

A. Previous to the accident she drove to the store, which is probably two and a half or three miles. She done all her own shopping. Since the accident I have delivered all of her groceries to her. The only time she comes to the store is when her husband or somebody brings her up. She is unable to drive.

Q. When the deliveries are made do you make them personally, Mr. Upright? A. Yes, sir.

Q. Have you had occasion to observe Mrs. Phillips in her home?

A. Both home and in my store.

Q. Will you just state what her condition is now as to her ankle insofar as you may have observed?

A. I have watched her when she has been to the store occasionally, and as long as she didn't know I was watching her she held on to things as she went down the aisles to pick up her groceries. She was unable to stoop to pick up her groceries, I always helped her, but she always had to have something to hang on to. At home I have seen her [166] on the davenport with her ankle swelled about as big as her regular leg is, and she never gets up without her cane.

Q. Was she expecting you on this occasion you mention when you saw her on the davenport?

A. No; I knock on the door and stick my head in the parlor and ask her if I can come in.

(Testimony of Ray Upright.)

Q. Do you remember specific occasions such as you have just mentioned?

A. I do. I can't give you any dates, but I have seen it many times.

Q. Do you know whether she walks around the house without a cane?

A. I have never seen her walk without a cane unless she was close enough to something to hold on to, to balance herself.

Q. Have you seen any evidence of pain on her part since the accident?

A. I would say yes.

Q. State what you may have observed in that regard.

A. I'll do the best I can.

Q. Yes.

A. Her nature today is not the same as it was when I knew her before the accident. Her leg undoubtedly bothers her; she favors it continually. You kind of stump me; I don't know what else to say, I don't know how to say it. I know [167] what I want to say, but I don't know how to say it.

The Court: Well, I think what we want is not your conclusions or what you think may be her condition, but any evidence that you have seen that would indicate that she has pains.

A. Well, the only best evidence I could give you would be just when she would try to get in and out of the car, or around the house, by just watching her expression, because you could tell it hurt her. In other words, if it didn't hurt her, her expressions wouldn't be there.

(Testimony of Ray Upright.)

Q. I think you said she's not the same person as she was before; just what do you mean by that, Mr. Upright?

A. Well, she gets mad more easily, I know that. She had always been able to get around, and was very even tempered, and it seems that something irritates her now.

Q. What was her disposition before this accident, if you know?

A. Very, very fine, as far as I know.

Q. And since the accident—I think you've answered it, haven't you, since the accident. You were in court yesterday, weren't you, Mr. Upright?

A. Yes, sir.

Q. Did you hear the government man, Mr. Benjamin, indicate that they had tried everything they knew to get rid of the ice in the gutter along that building?

A. Yes, sir. [168]

Q. And you indicated to my associate Mr. Kreshel that you thought there was something they could do that would assist that ice?

A. Yes, sir.

Q. What is there that you know about that should assist in disposing of ice under those conditions?

Mr. Kelley: Just for the record, I think this would be improper, not sufficient of a foundation to qualify him as an expert on building construction, elimination of ice, and so forth.

The Court: Well, assuming first it is the function of expert testimony, I don't think there's any

(Testimony of Ray Upright.)

foundation laid to show he is an expert in construction of eaves, clearing of sidewalk, and so on. I think perhaps an engineer might be an expert on that.

Mr. Wolff: I think if he's had some experience of that type then we should be able to show it.

The Court: Is that shown in the record?

Mr. Wolff: No, that hasn't been done.

Q. (By Mr. Wolff): Mr. Upright, have you had any experience with ice in gutters?

A. I had a similar occasion as to the one down there on that building, on my own building. I bought a—I don't know what you call them; all hardware stores sell them, they're a double wire about twelve feet long, hook them into a [169] light socket, and they're a leaded cable, you can string them wherever you want to, they won't catch fire. I put them along my eaves on top of my roof. It done away with my icing condition and I never had any trouble.

Q. What do they do, for the record?

Mr. Kelley: Just for the record, I object to that and I further move to strike the previous answer on the grounds of not sufficient qualifications, and secondly, no showing of the same or similar conditions as it is involved in the General Store Building.

Questions by the Court:

Q. Where is your store?

A. Electric City.

(Testimony of Ray Upright.)

Q. How far from this store we're talking about?

A. About three miles.

Q. Are the climactic conditions about the same as they are at the general store?

A. Yes, they are.

The Court: Overrule the objection.

Mr. Kelley: I had in mind the construction.

Questions by the Court:

Q. What kind of a building is it?

A. Exactly the same kind.

Q. A wood frame? A. Yes, sir. [170]

Q. What kind of roof does it have?

A. It has a roof that is not quite as steep a pitch as the Co-Op has.

The Court: I'll overrule the objection.

Further Direct Examination

By Mr. Wolff:

Q. And this electric cable you installed, what does it do with the ice that forms in the gutters?

A. It melts it, and causes it to run off.

Q. And do you then have difficulty with the ice in the gutters?

Mr. Kelley: Just for the record, your Honor will allow us objections on the grounds of competency to all this testimony?

The Court: The record may show that.

Q. (By Mr. Wolff): Do you have any difficulty with ice in the gutters when you use a device of that type? A. No, sir.

(Testimony of Ray Upright.)

Q. From your knowledge of the conditions on the General Store Building do you feel that the same type of device could be used on that building?

A. Yes, sir.

Mr. Wolff: That's all; you may inquire.

Cross-Examination

By Mr. Kelley:

Q. I believe, Mr. Upright, you said that you are familiar with the sidewalk there in front of the General Store Building [171] as shown by exhibit 12?

A. Yes, sir.

Q. And I believe you said that you had been down there three or four times a week to do your banking business at a bank in close proximity to that store building?

A. Yes, sir.

Q. So you had occasion to use the sidewalk in front of that store building quite a bit yourself?

A. Yes, sir.

Q. And I assume that you observed many other people using that sidewalk at the same time you were using it?

A. Yes, sir.

Q. And it's correct, is it not, as Mrs. Hunter testified, that on the day in question, January 28, 1949, a person had to be very careful in going over that sidewalk, because of the icy condition?

A. You say they had to be careful?

Q. Yes.

A. Yes, sir.

Q. And by the way, you yourself went over the sidewalk in front of the General Store where Mrs. Phillips fell that very day yourself?

(Testimony of Ray Upright.)

A. Yes, sir. To the best of my knowledge I done my banking that day, and the only thing I can say is——

Q. That's all right, if you'll just permit me to ask the [172] questions.

A. Excuse me, go ahead.

Q. Then as I understand it from your testimony, there were piles of snow up on the curb on Roosevelt Avenue, of the street?

A. The snow had been pushed out of the street up along this curb, that's right, and there was tunnels cut through where the people got out of their cars, they parked there and walked through these tunnels onto the sidewalk.

The Court: Do you mean tunnels, or cuts?

A. Just cuts.

Q. (By Mr. Kelley): How high?

A. I would say to the best of my knowledge that there was snow and sand and et cetera pushed up there that would go from two to three feet.

Q. Two to three feet? A. Yes, sir.

Q. And at different intervals there were cuts through this snow piled up?

A. It was either cuts or you went over the top of it, that's right.

Q. Do you recall whether there was a cut leading into the doorway of the mezzanine?

A. I do not.

Q. In any event, this snow condition was there on the curb so [173] that a person walking in the general easterly direction up Roosevelt Avenue

(Testimony of Ray Upright.)

couldn't walk up the curb, they'd have to go in the street or on the sidewalk, wouldn't they?

A. Yes, you'd have a little differential there, because the plows just kept pushing it up there, and you'd have a strip through there; now, that's all that I know of.

Q. By the way, was there also an accumulation of snow on the sidewalk in front of the General Store, and particularly in front of the beauty salon entrance there, was the snow on the sidewalk too?

A. You mean on top of the ice?

Q. Yes. A. Not to my knowledge, no.

Q. Oh, did you observe ridges of ice on the sidewalk?

A. I don't know how to answer that. I would say no. The sidewalk was nearly flat, however, sure there was some waves in it, but I don't think you'd call them ridges. A ridge is sharp, isn't it?

Q. I didn't quite understand your testimony when I was sitting over there about four or five pieces of ice.

The Court: Four or five inches of ice, I think he said.

A. Four or five inches of ice, of accumulation ice.

Q. By the way, as you have testified, there was a bad condition there for about a week? [174]

A. To the best of my knowledge, yes.

Q. To the best of your knowledge?

A. Yes.

(Testimony of Ray Upright.)

Q. And I believe you said you had lived in Electric City for ten years or so? A. Yes.

Q. And this weather condition there, Mr. Upright, this winter of 1949, was the first real cold weather experienced since January, 1937, isn't that your recollection?

A. You can stop me if you don't like this answer. My answer is we have winter down there every year, and water will freeze in 20 above just the same as it will freeze at 20 below.

Q. Yes, I understand, but wasn't this winter of 1949 the most unusual cold weather that you had experienced while you were down there? Isn't that true?

A. No, I can't say truthfully that it was much different than any other winter. Now, it may have been, according to weather reports, but what I mean is—I don't know how to answer that. It just don't seem that it was any worse that year than it was the winters before.

Q. It didn't. Directing your attention to the day of the accident—by the way, did you know about the accident the day that it happened?

A. Yes, I heard about it after it [175] happened.

Q. Well, did you know about it that day?

A. Yes.

Q. Well, then you recall that snow was falling since 8 o'clock in the morning of that day?

A. I can't recall the snow. However, in the Coulee we get a condition that you don't get here,

(Testimony of Ray Upright.)

and we get what is called frozen fog which is very light, very fluffy, any wind just picks it up.

Q. Well, do you recall that since 8 o'clock in the morning that day you had this condition you describe as frozen fog which any wind will pick up because it's fluffy? That was the situation that day, wasn't it? A. Truthfully, I don't remember.

Q. You don't remember. Was there anything with your experience with the electric cable to get rid of ice in your gutters that would refresh your memory as to the weather conditions there?

A. No. I just had so much trouble with my roof that I finally got one of those things.

Q. Yes, when did you get one of those things, electric cable, what year?

A. That I can't answer. I do not know. It was either two or three years ago. I don't know whether it was the winter of 1949 or 1950.

Q. Well, didn't you as a matter of fact get it in the winter [176] of 1950 after the severe winter of 1949? A. That I don't know.

Q. Well, now, just a moment; whereabouts did you get this electric cable from?

A. From the plumber right across the street from our store.

Q. And what's his name? A. Brenchley.

Q. Give us his full name for the record, please.

A. Brick Brenchley.

Q. And how much did you pay for this electric cable?

(Testimony of Ray Upright.)

A. Somewhere between ten and twelve dollars, in that neighborhood.

Q. And how long was this electric cable?

A. It's either ten or twelve feet.

Q. And it's hooked up to what?

A. A 110 light socket.

Q. Well, now, does that refresh your recollection that you got this electric cable in the winter following this severe winter of 1949, or not?

A. I don't know whether I got it that year or the year following.

Q. Yes. You will not testify under oath, Mr. Upright, that you bought that in 1949——

Mr. Wolff: I object.

The Court: Wait until counsel finishes his question; [177] you can't both talk at once.

Mr. Kelley: Will you read the question?

(Pending question read by the reporter.)

The Court: I'll overrule the objection; go ahead.

Q. (By Mr. Kelley): ——or in any year prior to 1949?

A. Uh, the only answer I could give you, Mr. Kelley, is that I could look it up in my expense book to find the exact date; that's the only way I could tell you. I have it all recorded.

Q. Do you have the expense book here?

A. No, I haven't.

Q. Is this gentleman that you referred to, is he still in Coulee Dam? A. Yes, sir.

(Testimony of Ray Upright.)

Q. Now, with regard to your experience with ice in gutters and matters of construction, how old are you, Mr. Upright?

A. 39 or 40; 40, I guess.

Q. What is your formal education?

A. Just a grocerman, is all.

Q. Have you gone to any engineering school?

A. No, sir.

Q. Any trade school relative to the construction of frame buildings or otherwise? A. No, sir.

Q. And how long have you been a grocerman? [178]

A. I've been in my present location nearly ten years, and then I worked in that location for a year and a half.

Q. And then before that year and a half what was your occupation?

A. I was on the coast, and at one time I had a small restaurant, and I went to school.

Q. And whereabouts did you go to school?

A. In Tacoma.

Q. High school? A. Stadium.

Q. How far along did you get?

A. Through the third year in high.

Q. And that's the nature and extent of your occupations since you got out of the third year of high school, as you've indicated to us?

A. Outside of a few odd jobs, yes.

Q. Those odd jobs I take it had nothing to do with construction? A. No, sir.

Q. Will it put you to much trouble to get this

(Testimony of Ray Upright.)

expense book you're talking about, when you bought the electric cable? A. How quick?

Q. Well, I ask will it put you to much trouble to get it? Can you phone down for it?

Mr. Wolff: Do you mean make a long distance telephone [179] call, Mr. Kelley?

Mr. Kelley: Yes.

Mr. Wolff: I don't think the witness is called on to go to that expense.

Mr. Kelley: Well, I'm just asking him.

The Court: Any other questions? Were you through cross-examining?

Mr. Kelley: Yes.

Redirect Examination

By Mr. Wolff:

Q. Mr. Upright, this electric cable you talked about, is that something that's sold by plumbing or hardware stores in a package over the counter, or something that has to be made up and ordered according to the job?

A. No, I'm sure you can get them right up here at Jensen-Byrd, the same thing.

Q. A packaged item that's sold over the counter? State your answer verbally, please.

A. Yes.

Mr. Wolff: That's all.

The Court: I think in view of all of the testimony here that the Court should grant the defense motion to strike that portion of this witness' tes-

timony which pertains to his use of the heating cable to keep ice out of the gutter on his own store, and his opinion as to whether that method could have been employed on the store building [180] involved in the present suit. I don't believe he's been shown to qualify as an expert in the field of how to keep ice from forming in a gutter, and it would seem to me what has been done in one other instance is not competent evidence. I think if the plaintiff relies upon that it should be possible to get experts to testify. All right, that's all, Mr. Upright.

(Whereupon, there being no further questions, the witness was excused.)

JACK BERRY

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your full name, please? A. Jack Berry.

Q. Where do you live, Mr. Berry?

A. Coulee Dam.

Q. At Coulee Dam? A. At Coulee Dam.

Q. How long have you lived there?

A. About four years.

Q. What is your occupation?

A. I'm a service engineer with the Westinghouse Electric Manufacturing Company, presently

(Testimony of Jack Berry.)

engaged in supervising the installation of generators at Coulee.

Q. Have you had any training in engineering, Mr. Berry? [181]

A. Yes, I have a degree in electrical engineering.

Q. Where did you receive your degree?

A. University of Washington.

Q. And when did you receive that, by the way?

A. Class of 1937.

Q. 1937? A. Yes.

Q. And what fields have you been engaged in since 1937?

A. Installation of rotating equipment, and general supervision of other engineers.

Q. In the engineering field at all times since 1937? A. Yes.

Q. You're now employed by Westinghouse, you stated? A. Yes.

Q. Mr. Berry, are you familiar with the property in Coulee Dam known as the General Store Building? A. Yes.

Q. And familiar with the north side of the building where there's a sidewalk along Roosevelt Avenue adjacent to the building? A. Yes.

Q. And are you familiar with that point along the building where there is an entrance to the mezzanine floor? A. Yes.

Q. I ask you if you had occasion to observe the condition of [182] that sidewalk in front of that entrance to the mezzanine on the 28th of January, 1949?

(Testimony of Jack Berry.)

A. I had occasion to check the sidewalk the afternoon of that day.

Q. And what did you observe as to the condition of the sidewalk on the afternoon of the 28th?

A. As I recall, the accumulation of ice at that time was being attempted—they were attempting to remove the accumulation of ice in the afternoon of January 28th.

Mr. Kelley: Simply for the record, your Honor, we object on the grounds of competency of any actions subsequent to the occurrence of the injury complained of.

Mr. Wolff: The purpose of this testimony, your Honor, is to show that there was ice there.

Mr. Kelley: I won't labor it as I would if we had a jury.

The Court: Very well, overruled.

Q. (By Mr. Wolff): What was the ice condition at that time, Mr. Berry?

A. Well, as I recall, the accumulation had developed from drippings from the roof on to the sidewalk, and the water had frozen on the sidewalk and had built up a considerable layer of ice.

Q. Are you able to state how high the layer of ice was in front of the doorway? [183]

A. No. It was noticeably thick where they were chipping the ice, where I noticed it, you could see the difference between where they had removed it and where the ice was still there.

Q. By the way, who was doing this removal job?

(Testimony of Jack Berry.)

A. Well, as I recollect at that time I assumed they were Bureau personnel.

Mr. Kelley: I move to strike the assumption, if your Honor pleases.

Mr. Wolff: We can't testify to what we assume.

The Court: Yes, I'll sustain the objection to that.

Q. If you know some facts——

The Court: I might say that this evidence of removal of ice, as I understand, is offered and will be received to show what the condition was at that time. It's my understanding that any action that may be taken after an accident isn't to be taken as an admission of faulty condition or negligence on the part of the defendant. That was your point, Mr. Kelley?

Mr. Kelley: Yes.

Mr. Wolff: It's not offered for that. While I do believe the cases will show it's admissible for that purpose, we do not offer it now for that purpose, but we do feel there is another purpose in addition to the one I mentioned earlier, and that is to show maintenance and [184] control by the Bureau, the fact they were removing both before and after, and I think it's admissible for that purpose.

The Court: All right, go ahead.

Q. (By Mr. Wolff): Can you state what you observed as to who these men were that were removing the ice?

A. I wouldn't know their names. My observation is only based on the fact that I recognized

(Testimony of Jack Berry.)

them as men that perhaps did other work around the area.

Q. Who did they do the other work for?

A. For the Bureau of Reclamation.

Q. Now, as to the condition of the ice and snow, or the ice, if it was just ice, and by the way, was there any snow there, or was it just ice?

A. Oh, it had snowed some time before that, I don't know how long, and there was patches of snow, perhaps, on the roadway or on the edges of the road, but I don't recall any snow on sidewalks that had been cleaned, or any fresh snow that day.

Q. Can you state whether the ice formation was smooth or rough or just what its condition was in front of the doorway at that time?

A. Ice forming on a sidewalk from drippings from the roof naturally builds up a little higher where the water drips, and was perhaps thickest at that point, and tapered off to [185] a rather thin layer out near the edge of the sidewalk.

Q. This thick condition, will you state as specifically as you can where it was? Where did you find the thickest condition of the ice?

A. On that sidewalk, from drippings from the roof, the thickest part of the ice is, oh, anywhere from one to two or three feet out from the building.

Q. And where was it in regard to the side lines of the doorway as they would be extended?

Mr. Kelley: Pardon me; just for the record, which doorway?

(Testimony of Jack Berry.)

Q. The doorway to the mezzanine stairs. Did you answer?

A. The thickest icing condition is, as I say, from one to three feet, perhaps two feet would be a better average, from the edge of the building, which would also be from the door.

Q. And did the—we might call it ridge of ice—extend past the doorway east and west, or was it confined to the doorway area?

A. East and west is the length of the building?

Q. Yes.

A. It extended practically the entire length of the building.

Q. Do you know, Mr. Berry, how long that condition existed before you saw it on the afternoon of the 28th?

A. The icing condition on that sidewalk exists practically all [186] winter long.

Q. It did that winter so exist? Give your answer audibly.

A. 1948 and 1949; every winter, in my experience.

Q. Did you have occasion to see the condition on the walk during the week before the 28th?

A. I go by the area once or twice a day.

Q. And did you go by that area once or twice a day during the week prior to the 28th?

A. Yes.

Q. And you observed the ice condition there during that period?

A. I perhaps walked on it two or three times during the week.

(Testimony of Jack Berry.)

Q. You walked on it yourself? A. Yes.

Q. Now, Mr. Berry, did you have occasion to observe the conditions of the gutters on the General Store Building over the doorway to the mezzanine on that day, the 28th of January?

A. The ice on the sidewalk forms mainly from an over-run of the gutters, when the gutters freeze over.

Mr. Kelley: I would think this is repetition and not responsive, if your Honor pleases.

Mr. Wolff: I think he was explaining what he saw as to the condition of the gutters.

The Court: Well, I'll overrule the objection.

Q. (By Mr. Wolff): Had you finished, Mr. Berry? [187] A. Yes.

Q. And can you state whether the gutters were in good or bad condition at that point on that day?

A. Well, I couldn't say as to the repair of the gutters. Insofar as they themselves are concerned they may have been in good repair. However, they were clogged with ice, and icicles were hanging from the edge of the gutters.

Q. Were they doing the job that gutters are intended to do?

Mr. Kelley: Well, if your Honor pleases——

The Court: I'll sustain the objection to that. As I understand your testimony, without taking too much time, Mr. Berry, what you observed was, as I understand it, the water from the roof melted and ran into the gutters and blocked it up?

(Testimony of Jack Berry.)

A. Blocked it up, yes, and then ran over the edges.

The Court: Ran over the edges and spilled on the sidewalk?

A. That's right.

The Court: Go ahead.

Q. (By Mr. Wolff): Are you familiar with any type of electrical device that might be used to melt ice in gutters?

A. Well, I know that there are devices on the market for keeping gutters above the freezing point so that they will not block up and plug up.

Q. And are you familiar with the construction of the eaves and [188] gutters of the General Store Building at this point over the doorway?

A. Yes.

Q. And from your training as an electrical engineer and your experience, are you able to state whether or not there is a device on the market to prevent this clogging of the gutters that you've described?

Mr. Kelley: Just a moment; I object to that on the grounds that in the first place he hasn't been properly qualified to propound a hypothetical question to him, and in the second place the question is too broad, and in the third place it doesn't embrace the necessary facts as far as this case is concerned, to propound a hypothetical question.

The Court: I would think that since he's an electrical engineer that his experience or lack of experience in a particular field would go to the

(Testimony of Jack Berry.)

weight of his testimony rather than its admissibility. It seems to me perhaps the question might be whether as an electrical engineer he knows of any method by which this condition could be remedied, rather than whether there is a device on the market.

Mr. Wolff: We'll ask the question in that form.

Q. (By Mr. Wolff): As an electrical engineer, do you know of any means by which this condition of the ice freezing in the [189] gutters and spilling over could be remedied?

Mr. Kelley: Just for the record, your Honor, I don't want to prolong this, we object on the three grounds hitherto urged, and on the further ground that an expert, while an expert may state his opinions based on assumed facts, they must be shown by the evidence of other witnesses or by the testimony of the expert himself in this case, and that has not been done, nor incorporated in the question, and then as a fifth and final ground, the question cannot be based upon the testimony given by the witness himself where this is merely assumed to be true.

The Court: Well, as I understand it this witness observed personally the condition of the gutters, and now he's testifying as an expert as to what could possibly remedy the conditions which he saw, and to which he's testified. Have you got any authorities that an expert can't base his opinion on his own observation of facts? Can he take the stand and testify on the basis of these facts?

(Testimony of Jack Berry.)

Mr. Kelley: No, I think the rule is very familiar, as your Honor indicated, that if the expert has personal knowledge of the facts, a question may be propounded to him, of course, but I didn't think that was the situation we had here.

The Court: The record shows your objection. It will [190] be overruled.

Q. (By Mr. Wolff): Do you understand the question, Mr. Berry?

A. I believe. I believe that there are—that resistance wires, to be specific, could be laid in the gutters to keep them free of ice under most conditions.

Q. And under the conditions that existed at this point? A. I believe so.

Mr. Kelley: As the winter of 1949?

Mr. Wolff: Of course, the witness is subject to cross-examination.

Mr. Kelley: Excuse me.

Mr. Wolff: We were referring all the way through to the particular time and place.

Mr. Kelley: Very well.

Mr. Wolff: You may cross-examine on that.

The Court: Had you finished your direct?

Mr. Wolff: No.

Q. (By Mr. Wolff): Mr. Berry, did you know Mrs. Phillips before she fell on the 28th of January? A. Yes.

Q. Have you been able to observe any change in the way she gets about since the 28th?

(Testimony of Jack Berry.)

A. Oh, yes, she seems to be handicapped in getting about at the present time.

Q. Can you state what facts you've observed in that regard? [191]

A. Well, at present she walks with a cane, and limps when I see her walking.

Q. Have you had occasion to see her when she was not in public since the 28th? A. Yes.

Q. Does she walk with the cane when she's not in public?

A. Oh, I've seen her reach from object to object in the house and leave the cane perhaps at the table or something.

Q. Do you know whether she suffers any pain at this time?

A. Oh, it was my impression that she was suffering.

Q. And what's the basis of that impression, Mr. Berry?

A. Oh, I can perhaps recall one instance at a social gathering where various games were played, and she sat down in a chair with her foot stuck out in the room all evening.

Q. Do you know, by the way, about her activities, those that she took part in before the accident?

A. Oh, somewhat.

Q. State what activities she participated in before the accident.

A. I'm not familiar too much with her social activities as I'm not connected with her lodges and what not. In my own recollection the Phillips and

(Testimony of Jack Berry.)

the wife and I have on occasions fished the San Poil River, which is not very far from there. Mrs. Phillips didn't do much fishing, but she went along in the party and seemed to enjoy herself. [192] Since then, since she had her accident, I think most of her fishing degenerated to boat fishing. I think it was about the time that she discarded her crutch, it was during the hunting season of immediately after her accident, I believe, in November, I believe, we wanted to—thought we would try to arrange a little trip for her to get away from the house, and we took a hunting trip on a boat that I own on Lake Roosevelt for two or three days, and as I recall, on that trip she couldn't get off of the boat any time during the trip, that she stayed on the boat when we went hunting.

The Court: The Court will take a five-minute recess. If you have the doctor coming after recess, Mr. Wolff, put him on, and then we can cross-examine this witness later.

(Short recess.)

The Court: Do you wish to proceed with this witness?

Mr. Wolff: Yes.

Further Direct Examination

By Mr. Wolff:

Q. Mr. Berry, we were discussing what you might know as to any change in Mrs. Phillips before and after the accident, and you had told how she had difficulty getting around, and stayed in the

(Testimony of Jack Berry.)

boat during a boat trip? A. Yes.

Q. Did you have occasion to experience anything else as to changes in Mrs. Phillips before and after the accident? [193]

A. When Mrs. Phillips came home from the hospital I used a truck that's at my disposal to haul the hospital bed down to her place, and I helped her, one of those that helped her get into the bed, and I saw her from time to time, oh, maybe once every two weeks or so since then.

Q. So when she came home from the hospital she was in a hospital bed? A. Yes.

Q. How long was she confined to that bed, if you know?

A. Oh, I believe it was two or three months.

Q. And do you know how she got around after she got out of bed?

A. As I recall, after she got out of the bed they put her on a crutch, and she hobbled around as best she could on crutches.

Q. Do you know what the apparatus was on her leg at that time?

A. As I recall she had a walking iron on her leg, but claimed that she couldn't use it.

Q. And do you know when she discarded the crutch?

A. Oh, she was on crutches for quite a while, I don't know just how long she was on crutches; I never did see that transition.

Q. And I believe you testified that you know she's using a cane all the time now?

(Testimony of Jack Berry.)

A. Yes, I know she's using a cane now. [194]

Q. Have you had occasion to observe any change in her disposition, Mr. Berry, after as compared to before the accident?

A. Mrs. Phillips used to be—I put it perhaps rather crudely—used to be a cheerful—had a cheerful nature and very jolly, as associated with rather stout persons. Well, she's not quite as cheerful at all times when I have been around her as she used to be. I believe she's improved quite a bit, though, since shortly after the accident.

Q. But still you feel she's not as cheerful and happy as she was before?

A. I don't believe she is.

Mr. Wolff: That's all; you may inquire, Mr. Kelley.

Cross-Examination

By Mr. Kelley:

Q. What was the occasion of your examination of the condition of the sidewalk there the afternoon after the accident? How did you happen to go up there?

A. I heard about the accident, oh, sometime in the afternoon, and it so happened that we were having a charter night for the Rotary Club that night. Mr. Phillips happens to be a member of the club. We were very much—by the way, it was going to be a ladies' night, too. We were very much disturbed by the fact that Mrs. Phillips was injured, and out of curiosity I recall stopping and looking at the [195] condition of the ice, and as I

(Testimony of Jack Berry.)

recollect, what I've told you before, very little except that there was ice there and men chipping the ice at that time.

Q. Did I get in my notes correctly that you're a service engineer with Westinghouse engaged in the installation of generators at the Coulee Dam?

A. Yes.

Q. You aren't a building inspector or anything of that nature at the Bureau of Reclamation?

A. I have no connection with the Bureau whatsoever.

Q. And as I understood it, you got a degree in electrical engineering from the University of Washington?

A. That's right.

Q. I take it—or do you happen to have a mechanical engineering degree, too?

A. I have an electrical engineering degree.

Q. You don't have a mechanical?

A. Most of my experience after being with the Westinghouse organization has been mechanical.

Q. Well, then, with respect to these electrical devices, have you ever put in any, yourself, personally?

A. No.

Q. Had ever any electrical devices that you've referred to ever been put under your direction and supervision?

A. No. [196]

Q. By the way, you said that you knew they were on the market. Do you know what makes, or who makes them? Does Westinghouse make one of them?

A. There are devices advertised by Sears and

(Testimony of Jack Berry.)

Roebuck and Montgomery Ward that are approved by the Underwriters, for such purpose.

Q. And the nature or extent of your familiarity with them, you've seen them in the catalog, I take it?

A. That's one of them.

Q. Well, you haven't ever worked around them or with them, have you?

A. I've used resistance wires for quite a number of other purposes.

Q. Well, I don't want to go far afield. I'm just asking you if you ever worked around or been familiar with electrical devices you've been testifying about?

A. I have never installed a device of that nature in a gutter.

Q. And I take it you wouldn't know how many thousand feeting of heating wire would be necessary to use in the gutter of this General Store Building as shown in plaintiff's exhibit 13, even if it were susceptible to an electrical device?

Mr. Wolff: Just a moment; are you referring to the whole building, Mr. Kelley, or to the one place of the building over this doorway?

Mr. Kelley: Will you read him the question, Mr. [197] Taylor?

A. Those devices are made up in units——

Mr. Kelley: Just a moment; I wanted you to give an answer, if you could, responsive to the question.

(Pending question read by the reporter.)

(Testimony of Jack Berry.)

A. I might say that two or three runs of assembled units the entire length of the gutter would do it. I don't know how long the building is.

Q. No, and you don't know how wide it is, do you?

A. I could make an approximation. I've seen the building.

Q. Well, you haven't made any investigation of the premises; you're not testifying from personal facts as to the engineering features involved in this General Store building, are you?

A. We're talking about the engineering features of the gutter.

Mr. Kelley: Read him the question.

(Pending question read by the reporter.)

A. No.

Q. (By Mr. Kelley): And, of course, you wouldn't be able to tell us how many circuits would have to be used there, as an engineering proposition, would you?

A. Oh, that wouldn't take long to figure out.

Q. No, but you can't tell us now, can you?

A. If you will tell me the type of units to be used, yes, I could tell you now. [198]

Mr. Kelley: Will you read him the question, please?

(Whereupon, the question was read by the reporter as follows: "And, of course, you wouldn't be able to tell us how many circuits would have to be used there, as an engineering proposition, would you?")

(Testimony of Jack Berry.)

A. Assume each circuit to be ten feet long, and if you used three circuits in parallel, and divide the length of the building by ten feet, and multiply it by three, would be perhaps a rough estimate of the number of circuits you'd need.

Q. Yes, but you made no personal investigation so you could give us even an approximation of what that would be?

A. That's an approximation I gave you right now.

Mr. Kelley: Will you read the question?

(Pending question read by the reporter.)

A. I've made no preliminary estimation.

Q. As a matter of fact you made no personal investigation or examination of this General Store Building with the idea of installing electrical devices, did you? A. No.

Q. By the way, do you know what the pitch of that General Store Building is as shown by exhibit 13?

The Court: That question isn't clear to me; perhaps it is to the witness. Do you mean the pitch of the roof? [199]

Mr. Kelley: Thank you, your Honor; I meant the pitch of the roof. I had my own thought on that; the pitch of the roof.

A. No, I don't know what the pitch of the roof is.

Q. (By Mr. Kelley): Can you approximate that, as an engineer, by looking at that photograph, exhibit 13? A. It has two slopes.

(Testimony of Jack Berry.)

Q. Well, what is the general over-all pitch of the roof?

Mr. Wolff: Are you referring, Mr. Kelley, to the pitch at the point of the eaves, or the pitch at the high point of the building?

Q. Do you understand the question, Mr. Berry?

A. Which part of the roof?

Q. Well, if you want to take them in segments, what is the pitch first from the high part of the roof to the first ending of the first incline, where I've indicated with my pencil in Exhibit 13?

A. Oh, first let me say that a picture——

Q. If you'll just answer the question. If you can't answer it say so, and we'll drop it. Will you read him the question again?

The Court: Do you know the pitch of the roof?

A. I don't know the exact pitch of the roof, no.

The Court: All right, ask another question. I don't suppose he would know unless he's measured it. [200]

Q. (By Mr. Kelley): Can you tell from that picture? A. No.

Q. And you haven't measured it, have you?

A. No.

Q. But you do, or do you, realize as an engineer that the pitch of the roof is very important in arriving at any opinion as to whether or not an electrical device would be feasible from an engineering standpoint in removing ice?

(Testimony of Jack Berry.)

A. I wouldn't think it would be too important.

Mr. Kelley: That's all.

Redirect Examination

By Mr. Wolff:

Q. I might ask you, Mr. Berry, what the principle of this device you mentioned, just how does it work and dispose of the ice in the gutter?

A. By passing electrical current through a wire, the wire heating up, and in turn heating the gutter by heat given off from the wire in contact with the gutter.

Q. And despite the outside temperature it keeps the gutter warm so that the ice melts and flows off?

A. That is right.

Q. And doesn't freeze? A. That's right.

Q. And do you feel that that's related to the pitch of the roof at all?

A. The pitch of the roof would regulate the amount of water [201] that would run off in a rain storm. However, with snow and ice on a roof that is more or less of a function of the rate of melting.

Q. And I think you indicated these devices come in units? A. That is right.

Q. And it's a matter of placing the number of units required by the——

A. What would be necessary.

Q. The principle is the same in all situations, just a matter of the heat from the wires melting the ice? A. That is right.

(Testimony of Jack Berry.)

Q. Are there any factors that could exist in such an installation which would make the use of this device impossible?

Mr. Kelley: Well, if your Honor please, I object to that on the grounds it's not a proper hypothetical question, doesn't embody the proper facts from this record and testimony, it's speculative.

The Court: Will you read it, please?

(Pending question read by the reporter.)

The Court: I think that's an explanation of his opinion. I'll overrule the objection.

A. If the gutter was too small in the first place to handle the amount of melting that it would have, naturally that would be a consideration, or if the gutter wasn't—I doubt if the device would work very good if it was [202] non-metallic, if it wasn't a good conductor of heat.

Q. Do you know if those gutters are metal there, Mr. Berry?

A. I believe they are.

Mr. Wolff: That's all.

Recross-Examination

By Mr. Kelley:

Q. Mr. Upright——

The Court: This is Mr. Berry.

Q. Well, I assume he's still upright. You can only melt so much ice per hour with one kilowatt of heat, isn't that the situation?

A. That's right, if it all goes into heat. You

(Testimony of Jack Berry.)

said one kilowatt of heat. They don't measure heat in such units.

Q. And secondly, this wire that you mentioned must be cool enough so that it doesn't ignite the building; that's correct, isn't it?

A. That's right.

Q. Then in the third place, as you indicated a moment ago, the ice has to be in close contact with the wire, does it not? A. No.

Q. Oh, it doesn't? How far away can the ice be?

A. The resistance wires not only give off heat themselves, but they also tend to keep the temperature of the gutter above the air temperature.

Q. Yes, but I asked you how close does the ice have to be in [203] contact with the wire?

A. That depends on the temperatures.

Q. Well, how about the building we're talking about right there in exhibit 13?

A. That also depends on the amount of heat each one of the units has.

Q. Yes, and that in turn, the conditions are not inherent at all times? A. They vary.

Q. Yes, and you'd certainly admit, wouldn't you, Mr. Berry, that directing your attention to the roof as shown in exhibit 13 there, the ice could bridge over such a wire as you've been trying to describe, and the ice would be melted after bridging over, and would fall in large chunks that produce a greater hazard than you've described?

A. I don't believe so.

Q. You don't believe so. Well, have you given

(Testimony of Jack Berry.)

any consideration to the fact that, you might say, the ice would move on the roof because of the pitch, and then bridge over this wire that you've been talking about, and then fall off in large chunks below? Wouldn't that be possible for the nature and extent of the pitch of the roof?

A. Not any more so than they would before they had the wires in the gutter.

Q. Well, are you familiar with the Administration Building [204] down there, of the Bureau of Reclamation, at Coulee Dam?

A. Only with going in and out of it.

Q. I take it that you haven't made a personal examination there relative to the possibilities of electrical devices? A. No.

Q. No. Can you indicate to the Court where the downspout of that building is, on exhibit 12?

A. I don't think I know exactly where it is, unless it shows in the picture.

Q. In any event, you made no personal examination of any downspouts there?

A. Oh, I've seen water coming out of a downspout. There's one here by the entrance to the main store.

Mr. Wolff: Do you want to identify that for the record, Mr. Berry?

Mr. Kelley: Just a moment; I'm trying to conduct a cross-examination.

Mr. Wolff: The question should show the answer.

(Testimony of Jack Berry.)

The Court: Just one at a time. Where did you say you've seen a downspout?

A. The picture shows a downspout.

The Court: I wonder if you'd mark an X there and put your initials? I think it shows on the picture, but if you'll mark it there won't be any doubt about it.

A. This is the only way I have of showing a location, because [205] this indicates a downspout.

The Court: Put your initials there, so we'll know who put the mark there. All right, proceed, Mr. Kelley.

Q. (By Mr. Kelley): Yes; and then as I understand it you've observed Mrs. Phillips at these various social gatherings you've been to subsequent to the accident, is that correct?

A. I recall one social function.

Q. And as I understand it you helped move her hospital bed to her home? A. Yes.

Q. You and Mr. Phillips are, that's the proper term, brother Rotarians? You're quite frequently with the Phillips, to put it in a sentence, aren't you? A. Yes.

The Court: While you're on that subject, it isn't clear to me, Mr. Berry, you're employed by the Westinghouse Electric Company putting in those installations down there?

A. Yes.

The Court: Is Mr. Phillips employed by the same company?

A. No, he is the resident engineer there or the

(Testimony of Jack Berry.)

representative of the Newport News Shipbuilding and Drydock Company on the installation of the turbines that drive the generators.

The Court: Oh; what is it you're working on?

A. On the generators themselves. [206]

The Court: I see. I'm not too familiar with the detail of what's going on there. Do you have any further questions? That's all, then.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Kelley: Simply for the record, your Honor, in view of the fact of the witness' testimony that he made no personal investigation of the matters on which he sought to answer the questions propounded to him relative to the electrical devices, the defendant respectfully moves the Court to strike that testimony in toto.

The Court: It will be denied; exception allowed. Call your next witness.

THERA PHILLIPS

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your full name, please? A. Thera Phillips.

Q. You're Thera junior? Your mother is the plaintiff in this action, isn't she?

(Testimony of Thera Phillips.)

A. Pardon?

Q. Your mother is the lady that brought the lawsuit?

A. Yes.

Q. How old are you? A. 17. [207]

Q. Do you go to school? A. Yes.

Q. Where do you go to school?

A. Coulee Dam High.

Q. What year are you in? A. Senior.

Q. In January of 1949, what year were you in school?

A. I was a freshman.

Q. You're familiar with the place where your mother fell, in front of the General Store Building?

A. Yes.

Q. How far is that from the school you were attending at that time?

A. Well, you go to the end of the store and across the street.

Q. Do you know the girl who testified here yesterday, what's her name?

A. Shirley.

Q. Shirley Johnson? A. Yes.

Q. Did she go to the same school? A. Yes.

Q. And did you hear mention of another girl that reached your mother before Shirley, but had left, or she didn't know where she was?

A. You mean did I hear Shirley say that yesterday? [208]

Q. Yes. A. Yes.

Q. What was her name?

A. Eileen something. Eileen Simpson, is that it? I don't know.

Q. Do you know who Eileen Simpson is?

A. No, I don't.

(Testimony of Thera Phillips.)

Q. Do you know whether she was going to your school at that time?

A. I don't believe so. I don't know her.

Q. Do you think you'd know her if she was going to your school? A. I believe so.

Q. Did you have any arrangement with your mother that morning as to when or where you would meet her during the day? A. Well, no.

Q. What were your plans about lunch, before the accident?

A. Well, she told me she was going to the hair-dresser's, and usually before she leaves she prepares lunch for us, and if she isn't there we come in and eat and put the dishes up and leave, and so that's the same thing it was that day.

Q. Well, did you eventually get home for lunch that day? A. Yes, I was home.

Q. Where were you when you heard about the accident?

A. Mr. Neuman came down to the house for Daddy, and I was there. [209]

Q. This man Mr. Neuman came to find your father? A. Yes.

Q. And tell him about the accident?

A. Yes.

Q. Will you state whether or not your lunch had been prepared for you when you arrived?

A. Yes, it was there.

Q. Was it laid out for you?

A. Oh, yes; I was heating some soup.

Q. What I want to know is whether your mother had prepared your lunch in advance for you and

(Testimony of Thera Phillips.)

left it all out, or whether you had prepared it yourself. A. Yes, the things were ready.

Q. And what was the customary time at which you were arriving home for lunch?

A. Well, school was usually dismissed about 11:20 or 11:15, sometimes it's a few minutes after and sometimes it's a few minutes before, and so I usually got home no later than—sometimes it was as late as quarter to 12:00, though. It varies.

Q. What time did your mother expect you home for lunch that day, if you know?

A. Well, golly, I don't know just when we got in; we never know what time we'll get out until we leave school.

Q. And did you have any plans to meet her on the street corner? [210] A. No, I didn't.

Q. You were going home, and you did go home?

A. Yes.

Q. Did your father arrive home for lunch before you left? A. No, he didn't.

Q. Were you expecting your mother, when Mr. Neuman came? A. Yes, I thought it was her.

Q. Did you have any particular time when you expected to see your mother?

A. Well, I didn't know what time she'd be in; I mean it just varies on what she has done to her hair, and I thought she'd be there when I got there, and she wasn't, and so I thought she'd be there in just a few minutes, and when Mr. Neuman came I thought it was her.

Q. Did the fact your lunch was all set out for

(Testimony of Thera Phillips.)

you indicate anything to you as to when your mother would be there?

A. Well, no; when she goes to get her hair fixed or anything like that she usually fixes lunch for me, because she doesn't know just how much time I'll have for lunch.

Q. Well, Thera, when did you first see your mother after she fell?

A. Well, Mr. Neuman came for me and we went back to the store and she was in on the floor of the grocery department.

Q. Did you go with Mr. Neuman?

A. Yes, I did. I left a note for my father. [211]

Q. And you saw her first, after the accident, on the floor of the store? A. Yes.

Q. Will you state her condition when you saw her first? A. You mean how she was laying?

Q. Yes.

A. Well, she was flat on her back, and I believe Shirley was holding her head up, and she kept complaining of her ankle, and I asked her if the doctor had been called or Daddy had been notified, and she said yes, but she was in great pain. There were tears in her eyes. She wasn't exactly bursting out crying, but she was awful close.

Q. Had the doctors arrived when you got there?

A. No, I was there it seemed ages, but I don't suppose it was too long, and both of the Wileys came.

Q. Were you there when she was carried out of the store? A. Yes.

(Testimony of Thera Phillips.)

Q. Did she suffer any when she was carried out of the store?

A. She was suffering all the time. She just complained of great pain in her leg and ankle. I said, "What does it feel like?" She said, "It feels numb; I think it's broken." I don't remember what I said, but she was in awful pain.

Q. Did she indicate to you she was having difficulty with any other part of her body?

A. No, she didn't, except she did tell me she felt she was all [212] right except "I wish they would get those coats off my legs," and I said, "They haven't put any on there yet."

Q. Were there any people around there at the time she was on the floor? A. Oh, yes.

Q. How many people?

A. Jeepers, I don't know; quite a crowd.

Q. You mean two or three people, or 20, or 30?

A. Well, I had to push my way through to get in there; I don't know how many.

Q. Were they all near your mother, or just scattered around the store?

A. No, they were looking at mother. I don't remember just who they were. They were all trying to do something.

Q. And do you know what activities your mother engaged in before she fell?

A. Well, she was in Eastern Star, and she was mother advisor at Rainbow, and she was a member of the Rebecca Lodge and the League of Women Voters. She was constantly doing something.

(Testimony of Thera Phillips.)

Q. Did she continue those activities after the fall?

A. Well, she still belongs, but she doesn't participate.

Q. She doesn't participate now?

A. Not as much as she used to.

Q. Why doesn't she participate now? [213]

A. Well, up where they have Eastern Star and Rainbow it's difficult for her to sit still very long, her ankle pains her, especially when she's on it, and it's very difficult for her to get back and forth because she can't drive.

Q. Have you seen her try to drive the car?

A. Yes, I have.

Q. What happens?

A. We don't go anywhere, because we can't. I mean she can't put any pressure on her foot at all.

Q. Have you seen her try to put pressure on?

A. Yes, I have.

Q. What happens?

A. Do you mean in the car, or just try to put pressure on?

Q. What happens when she tries to drive the car? A. She just can't.

Q. Does she say anything or do anything?

A. She just kind of groans and tears start to her eyes every single time.

Mr. Wolff: May we, your Honor, break into the testimony of this witness to present Dr. Wallace, who is here?

The Court: Yes. I thought Dr. Wallace was coming at 11:00.

Mr. Wolff: Well, we expected him, but he's here now.

The Court: Well, I'll have to suspend at [214] 12, because I have another hearing at 1:30. You can proceed with him, if you wish, as far as you can go.

(Whereupon, the witness Thera Phillips was temporarily excused from the witness stand.)

GEORGE T. WALLACE

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you state your full name, please, Doctor? A. George T. Wallace.

Q. You're a regularly licensed physician and surgeon here in Spokane? A. I am.

Q. You attended medical school and received a degree as an M.D.? A. Right.

Q. Where did you attend school, Doctor?

A. University of Chicago.

Q. When did you received your degree as an M.D.? A. 1938.

Q. Have you practiced your profession since that time? A. Yes, sir.

Q. Continuously? A. Yes, sir.

Q. Tell the Court where you've practiced since that time, Doctor. [215]

(Testimony of George T. Wallace.)

A. Well, I trained, of course, at the University of Chicago in orthopedics, and later at Mayo Clinic, and then I have four years as chief of orthopedic section in the Army and Navy General Hospital, Hot Springs, Arkansas, and since 1946, I've been practicing orthopedics in Spokane.

Q. You, I take it, then, specialized in orthopedics? A. Right.

Q. Will you explain to the Court what orthopedics is or are?

A. Orthopedics is that branch of medicine which deals with diseases and injuries of the bones and joints.

Q. Are you connected with any of the hospitals in this community, Doctor? A. I am.

Q. Which of the hospitals?

A. I'm on the staff of all three.

Q. Do you recall Mrs. Thera Phillips?

A. I do.

Q. Have you examined Mrs. Phillips?

A. Yes, sir.

Q. When did you first see Mrs. Phillips?

A. I can't tell you the exact date when I first saw her. The last time I saw her was March 21.

Q. Did you have occasion to make a casual examination of her here in the hall before you came in the courtroom? A. Yes, sir. [216]

Q. Before that you saw her in your office on the 21st of March of this year? A. Right.

Q. What examination did you make of Mrs. Phillips in March of this year?

(Testimony of George T. Wallace.)

A. The examination was limited to the findings in the right lower extremity.

Q. What did you find, Doctor?

A. The measurements of the calves and ankles are the following: Right, $14\frac{3}{4}$, the left, $15\frac{3}{4}$; that is the calf.

Q. You mean that her right calf was one inch smaller than the left?

A. Larger—smaller, that's right.

Q. The right calf was smaller? A. Yes.

Q. And it's the right ankle that was injured?

A. Yes.

Q. So there has been some, would you say atrophy, of the calf of the leg? A. Right.

Q. What are the ankle measurements?

A. The ankle measurements, on the right $10\frac{1}{2}$, and on the left, $9\frac{3}{4}$. The——

Q. Just a moment, please. That indicates, does it, Doctor, that the ankle that was injured—— [217]

Mr. Kelley: If the Court please, just let the Doctor testify; ask him what it indicates, for the sake of time.

The Court: Well, I think unless it's something that requires explanation, it's obvious that the right is $\frac{3}{4}$ of an inch larger than the left, is that correct?

Q. (By Mr. Wolff): The right ankle is larger?

A. Not quite—yes, that's right.

The Court: Well, I think you may let him give the measurements, and give his testimony, unless it's something that isn't easy to understand.

(Testimony of George T. Wallace.)

Q. (By Mr. Wolff): From $9\frac{3}{4}$ to $10\frac{1}{2}$?

A. Right.

The Court: Isn't that $\frac{3}{4}$ of an inch larger?

A. Yes; I'm sorry. The patient lacked 40 degrees of complete plantar flexion, and 10 degrees of complete dorsal flexion of the ankle, that is, downward movement was limited 40 degrees as compared to the normal uninvolved left ankle, and upward movement limited 10 degrees. The arterial pulsations were normal. There was very little subastragalar motion.

Q. What does that mean?

A. Sideward motion of the heel.

Q. There was very little of that motion?

A. Right. Do you want me to go ahead with the X-rays? [218]

Q. I would like you, doctor, if you can, to explain as fully in layman's language each of your findings so that we understand fully what you mean.

A. I think you can summarize it by saying there was atrophy of the musculature of the calf, the ankle was swollen, and there was limitation of motion both downward, upward, and sideward.

Q. Did you have occasion to examine X-rays of Mrs. Phillips? A. I did.

Q. Do you have them here?

A. I do not have them here.

Q. Can you state what you found from the X-rays?

Mr. Kelley: Oh, I would think just to limit the

(Testimony of George T. Wallace.)

extent of the record, that would be improper as not the best evidence.

The Court: I doubt if that would be permissible unless the X-rays are available for examination by the other side.

Mr. Wolff: Is it the Court's ruling that question is improper?

The Court: I don't think you should be permitted to testify to what the X-rays show unless they're produced, at least for inspection of the other side.

Q. (By Mr. Wolff): Are you able to determine, Doctor, whether or not there is any permanent disability in Mrs. Phillips' [219] ankle?

A. Yes.

Q. What is your opinion in that regard?

A. I thought there was very definite disability, permanent.

Q. Do you feel that her condition will improve, Doctor? A. I doubt it.

Q. Now, I believe you stated that you found there had been a break; did you so state?

A. Yes, sir.

Q. Can you state the nature of the injury itself in that ankle?

A. The ankle is supported by what we call the innter malleolus on the inside, and the exter malleolus on the outside, in lay terms.

Q. Would you be able to demonstrate or state more clearly in layman's language what that means?

A. Well, the two bones one feels when he puts

(Testimony of George T. Wallace.)

his hand on the inside and the outside of the ankle are the supporting bones, the malleoli. Both of these were fractured and entered the joint surface of the ankle.

Q. Was there any dislocation?

A. Not the films that I reviewed.

Q. Are you able to state whether the break that you learned of was present in a weight-bearing joint or not?

A. Yes, sir, it is a weight-bearing joint, and that's why I [220] believe the condition will gradually become worse from the standpoint of a traumatic arthritis as she gets older.

Q. Do you know what Mrs. Phillips' weight is?

A. I don't know exactly, but I do know that she is heavier than——

Q. I believe she testified 240 pounds.

A. Yes, sir.

Q. Is that about right from what you found?

A. Yes, sir.

Q. And are you able to state whether a person of that weight is, in your opinion, apt to have more trouble with a weight-bearing joint than a person of lighter weight?

A. I'm certain that the added weight would lead to further diasability.

Q. Do you know what Mrs. Phillips' complaints were at that time, Doctor, when you examined her in March?

A. Yes, sir.

Q. Will you state what her complaints were?

(Testimony of George T. Wallace.)

A. Pain on walking; swelling of the ankle, and limitation of motion, stiffness.

Q. Did she indicate whether changes of weather had any bearing upon her? A. Yes.

Q. What indication did she give as to that?

A. She stated that damp weather aggravated her symptoms. [221]

Q. From your findings would you state whether or not in your opinion these complaints were justifiable?

A. Yes, I think they would be justifiable.

Q. Is there any treatment that can be given to assist Mrs. Phillips at this time, in your opinion?

A. Well, of course reduction in weight would help. One has to confine her activities to the tolerance of the ankle joint, in other words, not walk excessive distances. Rarely we prescribe a brace to make the weight borne below the knee instead of in the ankle proper. At this time I don't think the severity of the changes in the ankle is enough to warrant an ankle fusion, stiffening the ankle and stopping all motion surgically.

Q. Is that the procedure that is sometimes followed in a case of this type?

A. If the disease, that is, the traumatic arthritis, progresses to a point that the patient is markedly limited, yes, I think that should be done.

Q. You don't feel this condition has reached that point at this time? A. I do not.

Q. Do you feel in your opinion that it might sometime reach that point?

(Testimony of George T. Wallace.)

A. I don't believe it will.

Q. Doctor, we have a copy of a report from Dr. Smick, who [222] examined Mrs. Phillips, and he indicates that he found some osteo-arthritic changes. Will you state whether or not you feel there are arthritic changes in Mrs. Phillips' ankle joint?

Mr. Kelley: I object to that, if your Honor please.

The Court: I think I'll have to sustain the objection to the form of the question. I can't properly consider the report of any doctor who isn't here to testify. You can ask him the straight-out question if he found anything of the sort.

Q. (By Mr. Wolff): Let me ask you, Doctor, whether you found any arthritic changes in that ankle?

A. I did not find any evidence from an X-ray point of view that there were arthritic changes.

Q. That was in March of 1951? A. Right.

Q. Now, when you examined Mrs. Phillips here today, of course it was casual, but was there any change from the condition you found when you examined her on March 21?

Mr. Kelley: With respect to what, if your Honor pleases?

Q. As respects the injury to this ankle.

A. The ankle is still swollen and there is still the atrophy of the calf.

Q. Did you measure the ankle and the calf today? [223] A. Yes, sir.

(Testimony of George T. Wallace.)

Q. Do you know what the measurements were today as compared to March?

A. The right calf, $14\frac{3}{8}$; the left calf, 16; the right ankle, $10\frac{1}{4}$, the left ankle $9\frac{7}{8}$.

Q. Were there any other changes than those that you observed, today? A. No, sir.

Mr. Wolff: You may inquire.

The Court: You may proceed; we'll try to get through if we can.

Cross-Examination

By Mr. Kelley:

Q. Doctor, when was the first time that you examined Mrs. Phillips?

A. I don't know the first time. The second time was March 21.

Q. Well, can you give us——

A. It was about six weeks before that, I think.

Q. The first time you examined her was about six weeks before March 21? A. I believe so.

Q. And were you called as her attending physician? A. No, sir.

Q. Then you haven't been called as her attending physician at any time? [224]

A. No, sir; no treatment.

Q. Do you happen to know who her attending orthopedic physician was at that time?

A. I believe it was Dr. Adams. No, I beg your pardon; it was a doctor in one of the smaller towns west of here, and then later Dr. Adams.

(Testimony of George T. Wallace.)

Q. Did you consult with Dr. Adams about Mrs. Phillips? A. No.

Q. And I take it he didn't give you any of his data or reports of investigation; and as you stated a moment ago, your examination was limited to findings in the right lower extremity, as you expressed it? A. Right.

Q. And——

A. And the left, of course, for comparison.

Q. And where was your second examination of March 21, 1951, held, Doctor?

A. In my office.

Q. That's in the Paulsen Building here in town?

A. Right.

Q. And about how long did it take?

A. Well, I would say twenty minutes.

Q. And then the third examination was the one you referred to as the casual examination out in the hall? A. Yes. [225]

Q. Was that subsequent to the time when I first saw you come in the door?

A. Just subsequent.

Q. And took about how long?

A. Oh, four minutes or five minutes.

Q. There is in evidence in this case, Doctor, for your information, a cancelled check to the Associated Anesthesiologists. A. Yes.

Q. Did you happen to send Mrs. Phillips to them? A. No.

Q. Is it possible, did you in the course of your examination send Mrs. Phillips to any other doctors

(Testimony of George T. Wallace.)

of the same type who could administer, what do they call that, sodium penathol? A. No.

Q. Did you administer sodium penathol?

A. No.

Q. I was wondering, if you had, you would be able to detect whether or not the patient can move her ankle sideways or flex her toes and so on?

A. You mean under sodium penathol?

Q. Yes.

A. Well, that's a very difficult question to answer. It has been used a lot by psychiatrists and so forth to detect [226] malingering.

Q. Yes; that is one of the recognized methods of detecting malingering, isn't it?

A. Yes.

Mr. Wolff: What was that word again, if I can have it repeated?

The Court: Malingering.

Mr. Wolff: Oh, yes.

Q. (By Mr. Kelley): And I suppose to a certain extent you had to depend upon what Mrs. Phillips told you subjectively as to her condition of her ankle?

A. Well, you have to evaluate the history, but of course the atrophy and the swelling are positive findings. The limitation of motion which I mentioned is passive motion, not active; in other words, I didn't ask her to show me how much she could push the foot down; that is actually how much I could push it down.

(Testimony of George T. Wallace.)

Q. Then you had an opportunity to observe that her reflexes are normal? A. Yes.

Q. And would you say her lower extremities are equal in size? A. No.

Q. Just to get clear in my own mind, Doctor, as I understand it there are three bones which enter into the formation of the ankle joint, are there not, the tibia and the fibula [227] and the ankle joint, or what do you call it, the astragalus, those are the three bones? A. Yes.

Q. Now, in this case, from your examination, could you tell whether the fibula was broken?

A. Yes, the X-rays showed a healed fracture when I saw it.

Q. Was that the fibula?

A. Yes, healing fracture of the fibula as well as the internal malleolus.

Q. And the treatment of this type of fracture, Doctor, briefly, is just the application of a suitable splint until the swelling subsides, and then encasing the limb in a plaster of paris cast, isn't that it, generally?

A. Well, they have to be reduced. If there's any displacement of the malleoli they have to be reduced to restore the ankle.

Q. I understood you to say there was no dislocation.

A. I didn't know; I didn't see the original films.

Q. But in general, if there's no displacement, in general a cast and immobilization, and time does the rest. Are there any objective symptoms of pain now? A. Yes.

(Testimony of George T. Wallace.)

Q. Well, you would say, wouldn't you, Doctor, that there isn't more than a permanent partial disability of 5 per cent as compared to a total disability? [228]

A. Total disability of the entire body, you mean?

Q. Yes. A. I would say from 5 to 10.

Mr. Kelley: I think that's all.

Redirect Examination

By Mr. Wolff:

Q. Doctor, it's alleged in this case that there was a dislocation. I believe you testified that you were not able to tell, because you didn't see the original X-rays. Assuming that there was a dislocation, in your opinion would that justify more pain and permanent disability than if there had not been a dislocation?

Mr. Kelley: I wouldn't feel that that would be a proper hypothetical question, if your Honor pleases; it doesn't embody the facts that are in this record.

The Court: Let's see; read the question.

(Pending question read by the reporter.)

The Court: I'm not sure; is there any evidence of dislocation here?

Mr. Wolff: It's alleged, and we intend to submit evidence of it.

The Court: Well, I'll let him answer, since he's here, but it's understood if there isn't any evidence of dislocation I'd have to disregard it.

(Testimony of George T. Wallace.)

Mr. Wolff: Oh, yes.

A. If there is dislocation there's definitely more injury to [229] the ankle, in that the ligaments are torn and the support of the ankle joint is considerably less than if the bones are simply cracked.

The Court: I think the question was whether there would be more pain.

Q. (By Mr. Wolff): Yes.

A. More pain and more disability, yes.

Mr. Kelly: Just for the record, I move to strike the answer in toto for the reasons hitherto urged.

The Court: Well, it's tentatively admitted. The record may show the objection.

Mr. Kelly: I was afraid I wouldn't move when he failed to produce other evidence.

The Court: All right, go ahead.

Q. (By Mr. Wolff): Assuming the same facts, Doctor, in your opinion would that provide a more permanent disability than if there had not been a dislocation? Is it more likely to provide a permanent disability than if there is not a dislocation?

Mr. Kelley: Your Honor understands for the record my objection goes to this whole line of questioning?

The Court: Yes, that's understood.

(Pending question read by the reporter.)

A. I believe that's true.

Mr. Wolff: That's all. [230]

The Court: Any other questions?

Mr. Kelley: No.

The Court: That's all, then, Doctor.

(Whereupon, there being no further questions, the witness was excused.)

The Court: As I have stated before, I have this other matter coming up at 1:30, so that the trial of this case will be suspended until 2:30 this afternoon.

(Whereupon, at 12:10 o'clock p.m., the Court took a recess in this cause until 2:30 o'clock p.m.)

Thursday, April 12, 1951

THERA PHILLIPS

a witness called on behalf of the plaintiffs, resumed the stand and testified further as follows:

Further Direct Examination

By Mr. Wolff:

Q. Can you tell us, Thera, about your mother's activities around the home, whether there's been any change in those since the accident?

A. Quite a bit.

Q. Tell us in detail what you can about that.

A. Well, before the accident she did just everything there was to be done, and now she can't wash or iron or cook or clean or anything like that, now. I mean if it has to be done my sister and I do it. The laundry has to be sent out; she does a few things but not very much, [231] because she can't stand up long enough, and she tires too quickly.

(Testimony of Thera Phillips.)

It's up to us now. She cooks once in a while, but not constantly like she used to.

Mr. Wolff: You may inquire, Mr. Kelley.

Mr. Kelley: I didn't have any questions.

(Whereupon, there being no further questions, the witness was excused.)

ERNEST W. NEUMAN

called as a witness on behalf of plaintiffs, being first duly sworn testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell your full name, please?

A. Ernest William Neuman.

Q. Where do you live, Mr. Neuman?

A. I live in Electric City.

Q. And what's your occupation?

A. Dairy products distributor.

Q. Where do you distribute dairy products?

A. In the Coulee Dam area.

Q. Are you familiar with the building known as the General Store Building at Coulee Dam?

A. I am.

Q. And are you familiar with the sidewalk around the north side of the building?

A. I am.

Q. Do you know where the entrance to the mezzanine stairway [232] is on the north side of the building?

A. Yes.

(Testimony of Ernest W. Neuman.)

Q. Do you have any occasion in your business to travel that sidewalk? A. I do.

Q. Did you travel that sidewalk on the 28th of January, 1949? A. Yes.

Q. I presume from your description of your work that you deliver milk from store to store or house to house, milk and other dairy products?

A. Yes.

Q. Is that a daily activity of yours? Do you do it every day?

A. Monday and Wednesday and Friday at Coulee Dam and down the river, and Tuesday, Thursday and Saturday up above the dam. Occasionally there's a delivery on the alternating days.

Q. Did you have occasion to deliver milk up in this General Store Building area on the 28th?

A. Yes.

Q. Did you have occasion to know the condition of the sidewalk in front of the doorway to the mezzanine that day? A. Yes.

Q. What time were you there, Mr. Neuman?

A. I was there approximately at 11:30.

Q. In the morning?

A. In the morning. [233]

Q. Do you know whether that was before or after Mrs. Phillips fell?

A. I drove up there, and I saw Mrs. Phillips lying on the ice.

Q. So you reached the scene as Mrs. Phillips was lying on the ice? A. Yes.

(Testimony of Ernest W. Neuman.)

Q. And what was the condition of the ice at that point and at that time, Mr. Neuman?

A. Well, there was ice, and it was slippery.

Q. Can you state whether it was smooth ice or bumpy ice? Describe it as best you can.

A. Well, it was bumpy ice. The nature of the ice was somewhere around between two and three feet from the edge of the building; there was a raise of approximately five inches, and then it tapered out to about two or three feet or more toward the curb.

Q. This raise of about five inches that you mentioned, was that in any kind of a line, or was it just in one pile?

A. It was in a line parallel with the eaves, or, well, what would you call it. It wouldn't be perpendicular. That would be perpendicular with the eaves, wouldn't it?

Q. You mean it was right under the point——

A. It was under the point of where the eaves——

Q. Extended? [234]

A. ——extended.

Q. About how far out from the edge of the building would you say that was?

A. Oh, I didn't measure it, but it's something over two feet.

Q. And how far did that ridge of ice five inches high extend east and west along the sidewalk?

A. Well, the five inch part, perhaps was three or four feet, and altogether there would be about

(Testimony of Ernest W. Neuman.)

five or six feet of the approximately same amount of raise. It may have been more, I don't know; I didn't go into that.

Q. Was it possible for a person to come out of the mezzanine stairway door and not walk upon this ridge of ice? A. No.

Q. Do you know whether water was dripping from the roof in front of that door at that time?

A. I don't know.

Q. Are you able to state what caused this ice on the walk at that point? A. I don't know.

Q. Do you know whether there were icicles hanging from the roof at that point at that time?

A. I don't know.

Q. Do you know how long the walk had been in that condition prior to the fall?

A. Well, most of the winter there was ice on the walk. It [235] might have been cleaned off once in a while, but it was still slippery.

Q. I believe you indicated you were up that way on Monday, Wednesday and Friday?

A. Yes.

Q. Do you know what day it was that Mrs. Phillips fell, on the 28th, was that a Monday, Wednesday or Friday?

A. I think that was on a Friday.

Q. Do you know the condition of the walk on the Wednesday before that? Was it the same?

A. Well, I didn't see anyone fall on it, so I wasn't particular about it.

Q. You don't know, then?

(Testimony of Ernest W. Neuman.)

A. I don't know.

Q. All right. Do you know whether or not Mrs. Phillips was suffering any pain at the time you found her on the ice?

A. Yes.

Q. By the way, was anyone there before you arrived?

A. There was someone there.

Q. Do you know who it was?

A. No, I don't know who they were.

Q. State what her position was upon the ice.

A. She was lying on the ice. Her ankle was mostly on the ridge, and to the slope toward the building was most of the rest of her body. [236]

Q. Was she lying on her side or back?

A. I can't recall that.

Q. Do you know whether any part of her body was in direct contact with the ice, without any clothing between her and the ice?

A. I don't know that.

Q. Do you know how long she lay on the ice before she was moved?

A. I don't know that.

Q. Did you leave the scene before she was moved?

A. Yes.

Q. Do you know anything about her social activities before she was hurt?

A. Yes.

Q. What activities did she have, Mr. Neuman?

A. Well, one of the activities that I know she has, she used to come up to Star.

Q. Eastern Star?

A. Eastern Star, and then after that she was

(Testimony of Ernest W. Neuman.)

—well, any time I've been there after that I haven't seen her.

Q. Where did you go when you left the scene of the accident?

A. Well, apparently I was one of the first ones there that she knew, and she asked that I go and find her husband or her daughter, and she was in great pain then, and someone was trying to help her out, as everyone would like to do, [237] and I went down to the house, and Mr. Phillips wasn't home, so I brought one of the girls up, and by the time I got back, why, then they had moved her in the store, and I saw Mr. Phillips walking up the sidewalk toward the entrance to the Co-Op Store.

Mr. Wolff: You may inquire.

Cross-Examination

By Mr. Kelly:

Q. Mr. Neuman, how long have you lived in Electric City?

A. Well, we—it was the year following the war we moved there.

Q. 1946?

A. Oh, something like that. I don't remember the date.

Q. You were there a couple of winters, at least, before this accident to Mrs. Phillips?

A. Yes.

Q. And this ice that you've been describing, that was right in front of the mezzanine door going up to the Dumas beauty salon?

A. Yes.

(Testimony of Ernest W. Neuman.)

Q. And as shown there in exhibit 12, the door of the mezzanine in that picture?

A. That's it.

Q. That's the door we're talking about.

A. Yes.

Q. And by the way, did you notice the snow piled up on the curb there of the sidewalk going in a general easterly and [238] westerly direction on Roosevelt Avenue?

A. No.

Q. I see; and you didn't notice any runways to go across the sidewalk in that vicinity of the door from the store, anything of that sort?

A. What do you mean?

Q. Well, you didn't notice any ridges where people had crossed through the snow to go across the sidewalk that you have described?

A. I don't know whether there was any snow on the sidewalk, even.

Q. But this ice that you're talking about, that was out two or three feet from the building, as I understand?

A. Approximately.

Q. Then it rose some five inches?

A. Yes.

Q. And then it went in the direction of the curb a matter of three or four feet?

A. Yes, it sloped both ways, toward the building and also toward the curb. I don't know whether it was three or four feet, or it might have been only two feet.

Q. And this ridge was at least as wide as the door into the mezzanine?

A. Repeat the question, please.

(Testimony of Ernest W. Neuman.)

(Pending question read by the [239] reporter.)

A. I didn't get that then.

Mr. Wolff: You didn't understand?

A. I didn't understand.

Q. The ridge you're talking about was at least as wide as the door to the mezzanine, wasn't it?

A. As wide as the door.

Q. As wide as the doorway; w-i-d-e.

A. What do you mean by it being wide?

Q. That's what I'm asking you.

The Court: Long, maybe you're talking about.

A. No, it wasn't as wide as the doorway.

Q. How wide was it?

A. It may have been two or three inches wide.

Q. Oh, and it ran in a direction toward the street, is that it? A. No, sir.

Q. Did it go—run east and west, did it?

A. It ran east and west.

Q. I see.

A. Parallel with the building.

Q. Not quite as wide as the doorway?

The Court: I think the confusing thing is, you're using the word wide, he's thinking of it being long. I suspect that's the difficulty. I think Mr. Kelley is asking how long it extended along the walk. Was it the full [240] width of the doorway?

Q. (By Mr. Kelley): Yes, was it the full width of the doorway?

A. Yes, it was the full width of the doorway.

Q. Was it any wider than the doorway?

(Testimony of Ernest W. Neuman.)

A. I can't understand what you mean by wide.

Q. How wide is this doorway from that side to that?

A. I don't know.

Q. What's your best estimate?

A. All right, we'll say four feet.

Q. All right, was this ridge you're talking about four feet?

A. The ridge was not four feet wide.

Q. How wide was it?

A. Approximately two or three or four inches on top, and it sloped down.

The Court: I think what Mr. Kelley is asking you, as I understand it, the ridge extended up and down along the walk, didn't it? Is that east and west?

A. The walk is east and west.

The Court: Was the ridge as long as the door is wide?

A. He's talking about a wide ridge.

The Court: No, I think what he wants to know is whether it extended as far along in length as the door is wide.

A. Yes. [241]

Q. (By Mr. Kelley): So there wasn't any question but what anybody going over the ridge would have to see it if they were looking for it?

A. Whether they could see it?

Mr. Kelley: Read him the question, Mr. Taylor.

(Pending question read by the reporter.)

Mr. Wolff: If you don't understand, just say so. Do you understand?

(Testimony of Ernest W. Neuman.)

A. No, I don't understand.

Q. Well, what don't you understand about it?

A. Whether anyone could see it or not.

Q. Well, it was there right in front of you as you went into the mezzanine. You saw it, did you?

A. Yes, I saw it.

Q. You walked over it?

A. No, I didn't walk over it.

Q. Well, I understood you to say, I may be wrong, because I have difficulty following you, but didn't you say it wasn't possible to come out of the mezzanine door without going over this ridge of ice?

A. That's right.

Q. Yes.

A. Unless you crawled up along the building either way.

Q. Oh, could you do that?

A. If you wanted to, if you had skates on, I suppose. [242]

Q. But you could go between the ridge and the building, could you? A. I don't know.

Q. Well, what did you mean just a minute ago?

A. Anyone can go most any place that they want to go.

Q. I understand, but was there sufficient space for a person to walk between that ridge that you've described and the side of the building?

A. Not without being on ice.

Q. But they could go without being on the ridge, and still be on the sidewalk?

(Testimony of Ernest W. Neuman.)

A. They wouldn't be on the sidewalk if they were on the ice.

Q. All right, was there room between this ridge and the building for a person to walk down on the sidewalk on the ice, do you know that?

A. What was that?

Mr. Kelley: Read him the question, Mr. Taylor.
(Pending question read by the reporter.)

A. Well, I'll say I don't know.

Mr. Kelley: Well, if you don't know I'm sure I don't. That's all.

Mr. Wolff: That's all.

(Whereupon, there being no further questions, the witness was excused.) [243]

PATRICIA PHILLIPS

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Tell the Court your name, please.

A. Patricia Phillips.

Q. Your mother is Thera Phillips, who brought this suit? A. Yes.

Q. Do you go to school, Patricia? A. Yes.

Q. What year are you in school?

A. Sophomore in Coulee Dam high school.

Q. You're younger than Thera, who testified here? A. Yes.

(Testimony of Patricia Phillips.)

Q. In January, 1949, where were you in school, what year?

A. I was in the 8th grade at the Columbia Grade School, which is across the river from the high school, in the main building.

Q. Do you know whether it snowed at Coulee Dam the morning of the 29th of January, 1949?

A. I don't know.

Q. 28th of January?

A. I don't remember it snowing that morning.

Q. You don't remember it snowing?

A. No.

Mr. Wolff: That's all; you may inquire. [244]

Cross-Examination

By Mr. Kelley:

Q. How old are you, Patricia?

A. 16 years old.

Mr. Kelley: Thank you. That's all.

(Whereupon, there being no further questions, the witness was excused.)

VIRGINIA SJOBERG

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Tell the Court your name, please.

A. Virginia Sjoberg.

(Testimony of Virginia Sjoberg.)

Q. Where do you live, Virginia?

A. Coulee Dam.

Q. Do you go to school? A. Yes, I do.

Q. What year are you in school?

A. Senior.

Q. Calling your attention to the 28th of January, 1949, were you living at Coulee Dam at that time?

A. Yes, I was.

Q. What year were you in school at that time?

A. Sophomore.

Q. Are you familiar with the General Store Building in Coulee Dam? A. Yes, I am. [245]

Q. And the doorway that leads to the mezzanine stairs? A. Yes.

Q. And the sidewalk on the north side of the building in front of the mezzanine door?

A. Yes.

Q. Do you know what the condition of the sidewalk was there at that point on the 28th of January?

A. It was icy.

Q. Can you describe the ice as you saw it?

A. Well, it was sort of bumpy; the water dripped on it and made little bumps in it, and it was awful slick.

Q. Did you have occasion to walk along the sidewalk at that point on the 28th of January, 1949?

A. Yes, I did.

Q. In front of the doorway to the mezzanine.

A. Yes.

Q. Did you have any difficulty walking there?

A. Yes.

(Testimony of Virginia Sjoberg.)

Q. Do you know whether the condition of the ice was the same prior to that morning?

A. Yes.

Q. How long was it the same?

A. Well, since quite some time, just about all winter, it was very slick.

Mr. Wolff: That's all, you may inquire. [246]

Cross-Examination

By Mr. Kelley:

Q. I take it, Virginia, you would walk over this sidewalk going to and from school?

A. No, I'd just walk out when I go to lunch.

Q. In any event, I suppose you go to lunch quite frequently?

A. Every day at noon, when I go to school.

Q. So you'd be going over the sidewalk almost every day? A. Yes.

Q. And as you've indicated for us, this sidewalk was icy? A. Yes.

Q. And ice is always slick, as you said?

A. Yes.

Q. And the rest of the students or some of the students go over the sidewalk with you at lunch, did they? A. My girl friend does.

Q. Your girl friend; who was that, one of the witnesses? A. Yes, Shirley Johnson.

Q. Oh, Shirley Johnson; oh, yes; and then in addition to you and Shirley I presume many people

(Testimony of Virginia Sjoberg.)

would use this same sidewalk we're talking about in front of the Mrs. Dumas Beauty Salon quite a lot all during January? A. Yes.

Q. How long have you lived down at Coulee, Virginia? A. About six years.

Q. This winter that Mrs. Phillips fell on the ice there where [247] we've been talking about, that was about the coldest winter that you experienced since you lived in Coulee, wasn't it

A. Uh huh.

Q. Do you mean yes, for the record?

A. Yes.

Mr. Kelley: I think that's all.

(Whereupon, there being no further questions, the witness was excused.)

HOMER C. PHILLIPS

one of the plaintiffs, called as a witness on behalf of the plaintiffs, being first duly sworn testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you state your full name, please?

A. Homer Clifford Phillips.

Q. Your wife is Thera Phillips? A. Yes.

Q. And you and she brought this action?

A. Yes.

Q. In January of 1949 were you and Mrs. Thera Phillips living together as husband and wife?

A. Yes.

(Testimony of Homer C. Phillips.)

Q. At Coulee Dam? A. Yes.

Q. When were you married, Mr. Phillips, you and Mrs. Thera [248] Phillips?

A. August 5, 1928.

Q. And you've lived together as husband and wife ever since then? A. Yes.

Q. When was the first you learned of Mrs. Phillips' fall?

A. On entering the hardware department of the store, right by the side of where the drug store partition is, one of the druggists met me there, I had went in the hardware store to make a purchase, and he asked me if that was my wife that had been hurt out front, and I says "I don't know" so he turned to the other druggist and says "Tommy, wasn't that Mrs. Phillips that was hurt out there?" and Tommy says "Sure," so that's the first I learned of it, and then I asked them where was she; "She's laying over on the floor in the grocery department," he says, so I went up there, and just as I got there the doctors were coming in with a stretcher—no, the two doctors were just putting her on the stretcher as I got there.

Q. Will you state how you and Mrs. Phillips were getting along together as husband and wife and what duties she performed, if any, as your wife prior to the accident?

A. Well, we as far as I know lived as two perfectly normal married people lived. We enjoy a lot of things in common, and I can't recall of any—well, I don't know—what [249] you'd call an argu-

(Testimony of Homer C. Phillips.)

ment or something; I don't know, there's different classifications of arguments, but we have prided ourselves on not leaving the house or something in an ill temper or something between us. I don't recall ever slamming the door and going taking a walk to cool off, as I have heard of people doing, and we are very proud of that. I think it's something to be proud of, anyway, and I think that I have a mighty fine cook. Of course, husbands are sometimes prejudiced, but I really enjoy my wife's cooking, and a lot of things, especially, being a southern boy, I like biscuits and I just like the way she cooks them, as well as baked beans with some molasses and bacon, I enjoy that, so since this accident my biscuits are kind of falling off a little bit.

The Court: If we keep this up the Court will have to adjourn early for dinner.

A. I beg your pardon, if I'm not answering the questions right or anything.

The Court: Go ahead, that's all right.

Q. Yes, I want you to tell what the relationship was between you and your wife prior to the accident.

Mr. Kelley: Would it shorten anything if we stipulated that it was an ideal marriage?

A. Well, I would consider that our marriage was an ideal marriage; I would. [250]

Q. Was there any change in those circumstances after this accident and as a result thereof?

A. Well, since this accident—she never has been

(Testimony of Homer C. Phillips.)

a lazy woman, I wouldn't call her lazy, she's an ambitious woman, but her activities in her home has been curtailed quite a bit since the accident, especially in the housework that normally a housewife does, and in keeping up the place she has to have quite a bit of assistance, and she just can't stay on her feet too long, to do quite a bit of things, and I have noticed in her disposition a little bit, if me or the youngsters kind of get out of line like we do sometimes, why, we get straightened out pretty rapidly. I didn't recall of her being maybe just a little bit picky before in her disposition. I think one of our biggest problems is the radio music. Something that the youngsters like, why, maybe that don't sound good to her and she wants it changed or shut off or something. That's one of the changes I've noticed.

Q. Any change in her over-all nature or disposition itself?

A. Well, being with your wife every day a person might not notice things as much as they would if they had seen them periodically, but I do think that different little minor things that annoys her now, I believe that that has been added on to her disposition.

Q. During the period that she was in the hospital who took [251] care of the household duties?

A. Well, it was between the youngsters and I, the two children and I.

Q. And when she came home from the hospital

(Testimony of Homer C. Phillips.)

was she at once able to resume her duties as a wife and mother?

A. No, she was in this hospital bed that we provided for her in the living room, she would be a little more comfortable there and have a little better outlook on the place; it was on the front of the building, and she stayed in that bed for several weeks, I don't recall the exact time, and of course she was unable to pick up her duties that she had had before.

Q. Is everything back to normal now except the biscuits?

A. Well, she has suffering and pain in her ankle, and she is unable to do the things that she did do before she was——

Q. What would you specify those are?

A. That would be housekeeping, cooking, and taking care of the place as a mother and wife.

Q. What about your activities outside the home; has there been any change in those?

A. Yes, there's been some changes in those to this extent, that we have enjoyed similar things prior to our marriage, and our tastes run along some together, and we enjoy fishing, going to movies, and going to certain meetings, and being with our friends, and since she has to go around [252] on a crutch or rather a cane, it's quite hard for her to go to the picture shows and go in between the seats with this cane; she don't like to be out in the public too much; it seems like—well, she says she's a large woman, she just hates to have to use the

(Testimony of Homer C. Phillips.)

darn thing to get around with, so we have curtailed our activities quite a bit due to some places necessitating using stairs and things which are very hard and uncomfortable for her to navigate.

Q. Had you and she actually gone stream fishing before this accident? A. Yes, sir.

Q. About how often would you go stream fishing with your wife?

A. Well, we usually made it on a Saturday or something like that. Maybe we would go and have a party maybe a couple of times a month for stream fishing, and probably sometimes in the evenings, the long evenings during the season, why, we'd go up to a lake and go boat fishing in the afternoon before it got dark.

Q. Have you been able to go stream fishing since her accident? A. No, sir.

Q. But she still goes boat fishing? A. Yes.

Q. I think your wife indicated something about western dancing.

A. Yes, we were members of the Coulee Dam Western Dance Club, [253] and of course that was prior to her accident, and of course since her accident she is unable to dance. We got a lot of pleasure out of that.

Q. Did you actually attend the functions of this dance club? A. Oh, yes.

Q. How often did that take place?

A. They met on Saturday nights; I believe it was every other Saturday night. I don't recall whether it was every Saturday night or every other Saturday night.

(Testimony of Homer C. Phillips.)

Q. How often did you attend those, you and your wife?

A. We went most every night that they had them.

Q. And has she been unable to attend them since?

A. We haven't been to any of them since.

Q. There's been some testimony here, Mr. Phillips, about her inability to drive a car. Does that have any bearing upon your enjoyment of your wife's services?

A. Well, to this extent; she could sometimes probably do an errand or something or go somewhere which I at the time would not be available, or if she happened to need the car she could take me wherever I needed to be at the time, and then use the car, if she could drive.

Q. Who does the shopping now?

A. Well, part of the shopping I do. The most of the shopping she does over the phone. What I mean, shopping, I go get what she calls up for sometimes, and sometimes it is [254] brought to the house, which is general.

Q. Did you have to do the shopping before the accident?

A. Well, I didn't necessarily have to, it wasn't that I had to, but sometimes I went with her and sometimes I didn't.

Q. Has the accident made any change in this shopping situation as far as you're concerned?

(Testimony of Homer C. Phillips.)

A. Yes, it has to that extent, that I do have to run to the stores more.

Mr. Wolff: I believe you may inquire.

Cross-Examination

By Mr. Kelley:

Q. Neither one of the girls makes biscuits, as I gather? A. No, sir.

Mr. Kelley: I guess that's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Wolff: At this time I would like to read into the record the deposition of Dr. Eugene D. Wiley.

The Court: Well, it may be published.

Mr. Wolff: I might say to your Honor that this deposition was taken upon notice, as is shown in the file. After the time had expired to serve cross-interrogatories, none were filed; at the request of counsel, however, we extended the time by stipulation, and none were then filed, and they were then submitted, and therefore there are no cross interrogatories. The [255] deposition of Dr. Eugene D. Wiley having been published, we will now read from it into the record.

Deposition of Dr. Eugene D. Wiley, a witness of lawful age, taken on behalf of the plaintiffs in the above-entitled cause, wherein Homer C. Phillips, and Thera Phillips, husband and wife, are

plaintiffs, and United States of America is defendant, pending in the District Court of the United States, for the Eastern District of Washington, Northern Division, pursuant to the notice hereto, annexed, before A. G. Hess, a notary public in and for Woodbury County, State of Iowa, commencing at 3 p.m. on the 6th day of March, 1951, said deposition being taken on written interrogatories.

Mr. Hess (Notary Public): The record will show the production of the notice for the taking of the deposition of Dr. Eugene D. Wiley before me at this time and place, upon written interrogatories, said interrogatories being attached to the notice.

DR. EUGENE D. WILEY

the witness named in the annexed notice, being of lawful age, and being by me first duly sworn in the above cause as hereinafter certified, testified on his oath as follows:

Direct Interrogatories

Q.-1. What is your full name?

A. Eugene Dalby Wiley. [256]

Q.-2. Where do you reside?

A. Sioux City, Iowa.

Q.-3. How long have you resided there?

A. Aproximately fourteen months.

Q.-4. Where did you reside before that?

A. Coulee Dam, Washington.

Q.-5. What is your profession?

A. Physician, regular.

Q.-6. Have you ever been licensed to practice as

(Deposition of Eugene D. Wiley.)

a physician and surgeon in the state of Washington?

A. Yes.

Q.-7. When were you so licensed?

A. July 20, 1938.

Q.-8. Do you still have such a license?

A. Yes.

Q.-9. How long have you practiced medicine?

A. Since 1929.

Q.-10. Of what medical school are you a graduate?
A. University of Iowa.

Q.-11. What other study or training did you have?

A. Regular internship, Salt Lake City General Hospital; three years assistant to general surgeon, Creston, Iowa.

Q.-12. Where have you practiced your profession?

A. West Yellowstone, Montana; Creston, Iowa; Merville, Iowa; Coulee Dam, Washington; Vancouver, Washington; Sioux [257] City, Iowa.

Q.-13. How long did you practice at Coulee Dam, Washington?

A. From June, 1938, to August, 1942, and from January, 1946, to August 1, 1949.

Q.-14. Did you practice privately there?

A. Yes, from 1946 to 1949.

Q.-15. Did you operate that hospital for the Bureau of Reclamation?
A. Yes.

Q.-16. Explain the arrangement under which you practiced at Coulee Dam, Washington.

(Deposition of Eugene D. Wiley.)

A. I was lessee of the Coulee Dam Community Hospital, was chief surgeon of the Columbia Clinic with offices in the Coulee Dam Community Hospital.

Q.-17. As a part of your work have you had experience in the taking and reading of X-ray pictures?

A. Of the reading of X-rays, yes.

Q.-18. What experience have you had in that line?

A. I have been reading X-ray pictures all during my practice of medicine, but more especially the years from 1938 to 1949.

Q.-19. How many X-ray pictures have you taken and examined during the course of your practice?

A. That would be hard to say, exactly. I suppose possibly 5000. [258]

Q.-20. As part of your training and in actual practice, have you made a thorough study of the anatomy of the human body? A. Yes.

Q.-21. Do you know Mrs. Thera Phillips, the plaintiff in this case? A. Yes.

Q.-22. Did you attend and take care of, as attending physician, Mrs. Thera Phillips, the plaintiff in this case? A. Yes.

Q.-23. When did she first become a regular patient of yours, to the best of your recollection?

A. January 28, 1949.

Q.-24. Did you make a physical examination of her at that time?

A. Yes, and more especially the right ankle.

(Deposition of Eugene D. Wiley.)

Q.-25. Have you attended her regularly ever since?

A. From that date until August 1, 1949.

Q.-26. Did you have an occasion to examine her on or about January 28, 1949? A. Yes.

Q.-27. What was that occasion, if you know?

A. She was brought into my hospital suffering from an injured right ankle.

Q.-28. State the extent of the examination you then made.

A. The ankle was inspected, palpated, and X-rayed. [259]

Q.-29. Describe the method of examination and technique that you used in examining her.

A. The ankle was inspected, was palpated, and an X-ray picture of the right ankle was ordered.

Q.-30. Did you take X-ray pictures of her?

A. X-ray pictures were taken under my order and direction.

Q.-31. What kind of machine did you use?

A. That was a 100 milliamperere General Electric machine.

Q.-32. Was it in good working order?

A. It was.

Q.-33. What technique did you employ?

A. It was the regular technique which had been determined previously for this particular machine.

Q.-34. Who developed the film?

A. The X-ray technician in the X-ray department in my hospital.

(Deposition of Eugene D. Wiley.)

Q.-35. Did you examine the film after taking the X-rays? A. Yes.

Q.-36. Did the films correctly portray the tissue as well as the bony structure?

A. It showed the tissues and the bony structure as you would expect from a satisfactory film.

Q.-37. In your opinion, did the film correctly portray that portion of the body or anatomy which they purport to show and which you took? [260]

A. Yes.

Q.-38. From your study of the X-ray films, which you took, and from your own physiscal examination, did you form an opinion, based upon a reasonable medical certainty, as to what the diagnosis in this case was? A. Yes.

Q.-39. What was that diagnosis?

A. A tri-malleolar fracture of the right ankle with some displacement of bony fragments with considerable soft tissue swelling present.

Q.-40. Do you have any X-rays pertaining to Mrs. Thera Phillips? A. I do.

Q.-41. Will you take a pen and number each and every one of the X-rays separately, as follows: Eugene D. Wiley, M.D., Deposition Exhibit "1," Eugene D. Wiley, M.D., Deposition Exhibit "2," etc., etc.? A. I will.

(The X-ray films produced and referred to were marked respectively: Eugene D. Wiley, M.D., Deposition Exhibits 1 thru 8, for identification.)

(Deposition of Eugene D. Wiley.)

(Whereupon, the X-ray films were re-marked in this trial as Plaintiff's Exhibits No. 20 thru 27, inclusive, for identification.)

Q.-42. Identify each and every one of the exhibits you have just marked, so that we may understand what each one of them is and state also the date when each was taken. [261]

A. Deposition exhibit No. 1, a lateral view of the ankle, shows a tri-malleolar fracture with some displacement of bony fragments. Exhibit No. 2, is an anterior-posterior view of the ankle, shows considerable soft tissue swelling with no increase in the ankle mortise. Exhibits 1 and 2, were taken January 28, 1949. Exhibit No. 3, date of January 29, 1949, anterior-posterior view of the right ankle in a cast after reduction, shows excellent position of the bony fragments. Exhibit No. 4, was taken on the same date, January 29, 1949, a lateral view of the ankle, shows the ankle in a cast after reduction, in good position. Exhibit No. 5, taken on February 25, 1949, a-p and lateral views of the right ankle in the cast, continues to show excellent position with early bone repair. Exhibit No. 6, same reading as No. 5, taken on the same date, February 25, 1949. Exhibit No. 7, taken on March 18, 1949, anterior-posterior, A-P and lateral views of the right ankle after the removal of the cast, shows a good alignment with a moderate amount of bony repair. Exhibit No. 8, date of April 8, 1949, shows the A-P and lateral of the right ankle without a cast, shows good position

(Deposition of Eugene D. Wiley.)

and good union of the previously reported fractures.

Q.-43. You stated you diagnosed Mrs. Phillips' condition, now will you state what, if anything, you did to treat the [262] injury you found on January 28, 1949?

A. The patient was anesthetized, the fragments were manipulated and felt to be satisfactorily reduced, and a cast was applied from the base of the toes to the mid-thigh.

Q.-44. Please go into the treatment in considerable detail and go through its entire course up to the last time you examined Mrs. Phillips.

A. Well, I cannot specifically state, giving accurate dates, regarding all the details of this case, as the records are not at my disposal. I can from memory recite some of the important facts. Following the original manipulation and reduction of the fracture the patient was hospitalized for approximately two weeks, and was seen several times daily by me while in the hospital. As I recall the original cast was removed within a period of fourteen to twenty-one days, and a second cast was applied. The second cast was removed at approximately seven weeks from the time of the original injury, and during the whole five weeks of this period the patient was confined to her bed at home. At the end of seven weeks a new cast was applied, and I believe a walking iron was placed on the cast, and with the aid of crutches she was moving around the house in a limited fashion. This cast was left on for approximately [263] another two

(Deposition of Eugene D. Wiley.)

or three weeks, and was then removed. An elastic bandage was applied to the ankle, and the patient was instructed to walk with crutches with limited weight bearing on the right foot. As I recall there was considerable swelling and edema of the foot and ankle after the removal of the cast, and the patient complained of considerable pain on attempted weight bearing and limitation of motion in the ankle joint. The patient was instructed to use hot soaks, and alternating hot and cold soaks to improve the circulation in the right foot and ankle. She continued to complain of considerable pain, aggravated markedly by weight bearing with limitation of motion, which condition still persisted when she was last seen by me late in July of 1949.

Q.-45. When did you last examine Mrs. Phillips?

A. Some time during the latter part of July, 1949.

Q.-46. Was there any change in the condition as you have described it at the time of your last examination?

A. I have already described the condition of this patient at the time of the last examination in answer to interrogatory No. 44.

Q.-47. Have you an opinion, based upon a reasonable medical certainty, from your examination, treatment and study of the case, as to whether or not the condition of the right ankle joint as you have described it is temporary [264] or permanent in nature? A. Yes.

Q.-48. What is your opinion?

(Deposition of Eugene D. Wiley.)

A. Basing my opinion on my observation while I treated her and at the time I last saw her, I felt that the X-ray pictures did not completely portray the whole picture in regard to this patient. There was marked soft tissue injury at the time of the injury. After the removal of the last cast, as I have stated previously, there was considerable swelling, and the circulation in the foot and ankle region was interfered with somewhat. There was considerable limitation of motion of the ankle joint, and there was considerable tenderness in the region of the ankle joint. As the patient was quite heavy I was inclined to accept at face value the statement that the ankle was very painful with weight-bearing and limited her activities to a considerable degree. It was my opinion that the woman would have considerable permanent disability of the ankle at the time I saw her late in July of 1949.

Q.-49. Will you compare her condition as you found it before January 28, 1949, to what you found when you last examined her?

A. I had occasion to see Mrs. Thera Phillips at not infrequent intervals prior to January 28, 1949, as an [265] acquaintance and in a social way, and had never noted any lameness nor any restriction of her many activities nor any difficulty in her walking.

Q.-50. You are acquainted with what the fair, reasonable and customary charge in Okanogan County, Washington, is for the treatment of pa-

(Deposition of Eugene D. Wiley.)

tients, such as you have described, during the year 1949? A. Yes.

Q.-51. What is the fair, reasonable and customary value of such medical services as you rendered Mrs. Phillips over the entire period of time from January 28, 1949, when you undertook treatment, down to the time you last examined her?

A. Approximately \$125 to \$150.

Q.-52. Have you an opinion, based on a reasonable medical certainty, as to whether it will be necessary for Mrs. Phillips to continue under medical treatment? A. Yes.

Q.-53. What is that opinion?

A. It was my opinion she would need continued treatment and observation at the time I last saw her in July of 1949, and as I recall I referred her to an orthopedic surgeon in Spokane for future treatment.

Q.-54. Can you state whether or not Mrs. Phillips suffered as a result of this injury, during the period you were caring [266] for her?

A. Yes.

Q.-55. State in full and complete detail the extent of her suffering as far as you know.

A. The patient complained of almost continual pain in the right ankle from the time I first saw her on January 28, 1949, which was aggravated by weight bearing, and which prohibited any long period of weight bearing from the time of her injury on January 28, 1949, until last seen late in July of 1949.

(Deposition of Eugene D. Wiley.)

Q.-56. If Mrs. Phillips was a pianist, can you state whether she could use her right foot to operate the pedals of the piano after January 28, 1949?

A. As I recall the patient stated that she could not use the pedals of the piano using her right foot up to the last time that I saw her in the latter part of July, 1949.

Q.-57. Do you know whether Mrs. Phillips' condition after January 28, 1949, limited her daily activities? A. Yes.

Q.-58. State the full extent of the limitations, if any.

A. The patient was in the hospital from January 28th for a period of two weeks approximately. Following this she was in bed at home for a period of approximately five or six weeks. As I have previously stated following the removal of the last cast the patient was instructed to [267] use crutches and gradually increasing weight bearing using the right ankle. Because of the pain in her ankle, her weight probably being a contributory factor, all of her activities were markedly limited. During the latter period of time previous to and including the latter part of July when I was attending her she was attempting to use a cane, but without a great deal of success, as the pain in the ankle restricted her activities markedly. The condition as I have described above was the condition which existed at the time I last saw her in July of 1949.

Q.-59. If your answer to the last question was

(Deposition of Eugene D. Wiley.)

no, state how long this condition continued, if you know?

A. The condition I have described above was present when I last saw her in July of 1949, and what condition has existed since that time I do not know.

/s/ EUGENE D. WILEY, M.D.

Subscribed in my presence and sworn to before me by the said Eugene D. Wiley, M.D., on this 7th day of March, A.D. 1951.

[Seal] /s/ A. G. HESS,
Notary Public in and for the County of Woodbury,
State of Iowa.

My Commission expires July 4, 1951.

(Notary's Certificate at conclusion of Deposition.) [268]

Mr. Wolff: That's all.

The Court: Do you wish to offer the X-rays, then?

Mr. Wolff: Yes, I move their admission in evidence.

The Court: Plaintiff's identifications 20 to 27, inclusive, will be admitted.

(Whereupon, Plaintiff's Exhibits No. 20 to 27, inclusive, for identification were admitted in evidence.)

Mr. Wolff: Now, we had some exhibits that we haven't moved be introduced in evidence. There's the daily weather reports, I think they are identified as number 14, is that right?

The Clerk: Yes, they were identified on behalf of the defendant.

Mr. Wolff: As to plaintiff's identification 9, I think it was stipulated that it is a genuine document, and we move its introduction in evidence. The underlining is mine, by the way.

Mr. Kelley: Might I inquire what the purpose is?

The Court: Yes. Perhaps if I look at it I might get a better idea of what your discussion is here regarding it. All right.

Mr. Kelley: I thought the matter of the incorporation of Coulee Dam was covered by the pre-trial conference. In any event—— [269]

The Court: You offer it to show that the town is not incorporated?

Mr. Wolff: No, no, for the purpose of showing the second item I underlined there; doesn't it say that the Bureau exercises maintenance and controls the property, of everything in the community?

The Court: Yes, of such properties it operates.

Mr. Wolff: That's the purpose of introducing it.

Mr. Kelley: Object to any conclusion that the Bureau exercises all the incidents of ownership. That, of course, is one of the factors the Court has to pass upon.

Mr. Wolff: I think the government will have an opportunity to show that is not the fact, if it is not the fact. It's within their control to bring any of the people of the Bureau to show that information.

The Court: If this were a private corporation the letter would be admissible. I'm not too sure

about what the rule is where the action is against the government; the Tort Claims Act provides the government shall be liable under the same circumstances as an individual; whether that would apply to an admission by competent government officials I'm not sure, frankly. I'll admit it, reserving the right to pass upon whether it should be considered or not. [270]

(Whereupon, Plaintiffs Exhibit No. 9 for identification was admitted in evidence.)

Mr. Wolff: We now move the admission of plaintiff's identification 10.

Mr. Kelley: The defendant objects to the admission of exhibit 10 on the grounds that it's not competent, relevant, and immaterial in an action of this type; I assume that your Honor wouldn't admit it if we had a jury. I want to make the objection for the record, not just for the benefit of my client, but of the others mentioned therein.

Mr. Wolff: Of course it can't have a bearing upon anyone not a party to this action; only the party to this action.

The Court: I think the objection should be sustained. It wouldn't be competent if there were a jury here, and I'll instruct myself to disregard it in this case.

(Whereupon, Plaintiff's Exhibit No. 10 for identification was rejected.)

The Court: Is that all that you have so far as you know, Mr. Wolff? I might suggest it's time for

adjournment, and that will give you over the overnight adjournment to check up and see if you've omitted anything, and then if you haven't I presume you'll rest in the [271] morning, is that the situation?

Mr. Wolff: That's right, your Honor.

The Court: All right, the Court will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 4:35 o'clock p.m. the Court took a recess in this cause until Friday, April 13, 1951, at 10 o'clock a.m.)

Friday, April 13, 1951

(All parties present as before, and the trial was resumed.)

Mr. Wolff: Can you agree these may be admitted?

Mr. Kelley: Yes.

(Whereupon, Plaintiff's Exhibits Nos. 8 and 8-a to 8-h for identification were admitted in evidence.)

Mr. Wolff: We rest our case.

Mr. Kelley: Just for the record, your Honor please, the plaintiffs having rested, the defendant moves for a non-suit on the grounds there has been a total failure of proof to show there is any liability on the defendant the United States of America in this case, and specifically no evidence indicating any duty of the defendant towards these plaintiffs or a breach thereof, and the [272] second

ground of the motion is that the evidence as adduced not only shows no liability, but affirmatively shows contributory negligence on the part of the plaintiff Thera Phillips. I know the Court has pressing matters, so we would ask you to reserve ruling and perhaps we will renew our motion and take up the matter in argument.

The Court: I haven't anything else for the rest of this week, so you needn't hurry on that account, but I would like to see the lawsuit finished this week. As I have stated on former cases, and I think it's justified by the attitude of the Court of Appeals, that unless I'm very, very sure that a case should be terminated at the close of the plaintiff's evidence I prefer to hear the whole case and then pass on the questions involved, so if it goes up to a higher court it can be decided on the whole record, so I'll deny the motion and allow an exception. Proceed.

WILLIS E. SMICK

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Willis E. Smick.

Q. You are a medical doctor?

A. Yes, physician and surgeon. [273]

Q. And where do you practice, Dr. Smick?

A. Spokane, Washington, 307 Fernwell Building.

(Testimony of Willis E. Smick.)

Q. And how long have you practiced in Spokane, Washington?

A. Approximately three and a half years.

Q. And you received a regular medical education from what school?

A. University of Oregon Medical School.

Q. And have you served internship?

A. Yes, one year rotating internship, Providence Hospital, Seattle, Washington.

Q. And how long have you been engaged in the practice of medicine in all?

A. Approximately nine years.

Q. And what branch of medicine have you practiced in that nine years?

A. Well, general practice.

Q. And did your general practice include the treatment of bone injuries and torn ligaments and X-raying of bones and torn ligaments and so forth?

A. I spent three and a half years as industrial surgeon for the Northwest Improvement Company, known otherwise as Roslyn-Cle Elum Beneficial Association, at Cle Elum, Washington, wherein I took care of 800 miners and their families, industrial surgeon there, and also during that three year period I was local surgeon for the Milwaukee [274] and the Northern Pacific railroad.

Q. Pursuant to our request did you examine the plaintiff, Thera Phillips?

A. I examined Mrs. Thera Phillips on September 11, 1950.

Q. And what type of examination did you cause

(Testimony of Willis E. Smick.)

to be made of Thera Phillips at that time, Doctor?

A. Well, I was mainly interested in this history of injury of the right lower extremity, in the ankle and foot region. However, I did check her over, her cardio-vascular system in regards to her blood pressure, and her weight, and a neurological examination.

Q. Now, will you state the result of your examination both as to her cardio-vascular system and general health and also in regard to—will you state that first?

A. Well, she came walking into the office using a cane and limping, and eye, ear, nose and throat examination didn't reveal any chronic evidence of traumatic head injury. The eye grounds didn't show any increased inter-cranial pressure, and the cardio-vascular examination, the blood pressure was found to be, and I repeated it a couple of times, 190 over 100, that's 190 systolic over 100 diastolic. The heart was regular, the chest was clear, the thyroid gland was not palpable, and abdominal examination, felt for the liver and and the spleen, but we didn't do any pelvic examination. The lower extremities were [275] essentially negative except that the circumference around the right ankle was $\frac{1}{4}$ inch greater than the left ankle. That's over the junction of the lower leg bones and the foot joint, there, internal external malleoli where the tibia and fibula articulate with the astragalus.

Q. Before we pass on to that, what would you

(Testimony of Willis E. Smick.)

say about her blood pressure being normal or abnormal?

Mr. Wolff: As of what date?

Q. As of the date of examination, September 11, 1950.

A. Well, I'd say that blood pressure was exceedingly high. I repeated it again yesterday. It's very pronounced, I would say it's on the borderline stroke condition, and I feel that with her weight of 236 pounds this might impair her ability to maintain her balance at times. These people who have a constant high blood pressure get dizzy spells quite frequently at times. Some of them don't have them very often, but then again that's a very common complaint of high blood pressure.

Q. What would you say as to her weight being normal or abnormal, and if so, how much is it out of line in abnormality?

A. I would say that a good weight for her height and skeletal structure would be about 180 pounds, and she could carry that very easily and wouldn't put any extra strain on her heart and blood vessels, and her blood pressure probably [276] would drop down to, oh, I would say around 160 over 90 or 80, which is normal.

Q. Would it be possible under proper medical care to effect the weight reduction and the reduction in blood pressure?

A. It would be a gradual process. I don't think it's due to her glandular system at all. I think it's just a matter of restricting the weight-producing

(Testimony of Willis E. Smick.)

foods, and it would take about a year of constant medical supervision.

Q. Now, Doctor, did you cause an examination to be made of the left foot?

A. I examined the left foot the other day, the day before yesterday; had it X-rayed. I didn't make any extensive physical examination because I wanted to compare the bony X-ray—from the X-ray evidence the bony change, if any, in the right foot and ankle as compared to the left foot and ankle, because we know that if a part isn't being used it shows on X-ray, and if a generalized arthritis is evidenced throughout the body, it will show in the uninjured foot. If the arthritis is due to an injury it will show only in the injured area. There was no difference in the calcium decalcification process, or any pathological process in the left or right foot, which shows that both parts are being used, and if a part isn't able to function and isn't able to be used it will gradually get smaller, and the X-ray will show on examination that the calcium is [277] being not deposited as it is in the bony structure that is being used, and the X-ray examination the other day didn't show any active arthritic process or aggravation in either foot. In fact, it showed some improvement over the X-ray taken on September 11, 1950. There was a minimum amount of arthritic change in the lower part of the ankle at that time.

Q. Did you find arthritis in your examination of September 11, 1950? A. A very small amount.

(Testimony of Willis E. Smick.)

Q. Did you find more, or less, in your examination of last Tuesday or Wednesday?

A. Well, according to this X-ray roentgenologist, his interpretation and mine also, we find——

Mr. Wolff: Just a moment; I object to what someone else may have said or interpreted.

The Court: Yes, I think the testimony should be limited to the doctor's own opinion.

A. Well, it's my opinion after examining the X-rays also the day before yesterday that there was very little evidence if any of any arthritic activity in the right lower extremity.

Q. What was her condition on September 11, 1950, with regard to the injured ankle, her use of that?

A. What was the question? [278]

Q. What was her condition, what was the condition of the injured ankle and what did your examination show about her use of the injured ankle?

A. There was a definite, demonstrable physical impairment there. The joint freedom of motion was restricted a small percentage in every direction, eversion, which is out and upward motion of the ankle—of the foot, and inversion motion was slightly restricted. However, it was very minimal, and there was some residual enlargement of, I say, $\frac{1}{4}$ of an inch estimated circumference around this fractured area of the internal external malleoli, but as far as demonstrating the pain she complained of, I couldn't find as much evidence of this pain, as much as she was complaining of. I couldn't demonstrate on examination just enough organic

(Testimony of Willis E. Smick.)

pathology to cause that much pain. However, that is a subjective condition, and it is at times difficult to try and find all the organic basis for nerve pain.

Q. Now, in your examination on April 11, 1951, what did you find with regard to movement of this injured ankle at that time?

A. I didn't examine it further at that time. I observed her walking around the room, and took her weight, but I didn't make any extensive examination of the range of motion of the ankle. [279]

(Whereupon, four X-rays were marked Defendant's Exhibits Nos. 28, 29, 30 and 31 for identification.)

Q. (By Mr. Erickson): I'll hand you these, Doctor, and ask you what those are.

A. Number 28, that's an X-ray of Mrs. Thera Phillips' right—it's on the right foot and ankle, taken on 4/11/51, and it shows the right foot and ankle.

Q. I hand you——

A. Just a minute, I want to say a little more about this. This shows the old fracture of the internal malleolus in good position, and the tips of those fractured bones, the head of the fibula and the internal malleolus of the tibia are well healed; in fact, it's difficult at this time to even see that the bone had been broken. There is very little, if any, arthritic change in any of the joint articulations.

(Testimony of Willis E. Smick.)

Q. I'll hand you 29 and ask you to state what that is.

A. That's the left foot and ankle——

Mr. Wolff: Just a moment, please; I think it's in order for the record that we object to reference to these exhibits without them being identified; they haven't been identified.

Mr. Erickson: That's what I'm trying to have done.

The Court: Just a moment; I think they should be [280] identified and offered first, and then have the doctor comment on them. He can tell what they are.

Q. (By Mr. Erickson): Just state what 29 is, Doctor.

A. X-ray Exhibit 29 is the left foot and ankle of the plaintiff.

The Court: Were these X-rays taken under your direction, Doctor, or in your office? How were they taken?

A. I sent them to a roentgenologist upstairs.

The Court: I see; they were taken at your direction?

A. My direction.

Q. (By Mr. Erickson): I hand you 30, and ask you what that is?

A. This is the right concentrating X-ray of the right ankle region.

Q. Taken at the same time and place and under your direction? A. Yes.

(Testimony of Willis E. Smick.)

Q. I hand you 31, and ask you to state what that is?

A. This is the left foot and ankle, Exhibit 31, taken under my direction, of the plaintiff.

Q. April 11, 1951? A. Yes.

Mr. Erickson: I'll offer 28, 29, 30 and 31.

Mr. Wolff: I don't care to look at them. For the record, I don't want to delay matters, but I do think they have not been properly identified, and I object to them on [281] that ground. They weren't taken in his office; he wasn't present, he's testifying these are pictures of her leg, and I don't think they are admissible under the rules.

The Court: I doubt if they have been properly identified, that he knows what they purport to be.

Q. (By Mr. Erickson): Do you know that these are taken of the right and left leg, lower leg, of Thera Phillips? A. Yes.

The Court: How do you know that, Doctor?

A. Well, we get a written signed report of every X-ray patient that's sent upstairs to a fellow who is a specialist in X-ray work, and in fact he brought them downstairs and showed them to my nurse, I happened to be out at the time. On this particular instance we wanted to look at them wet.

Mr. Wolff: I don't think that identifies the X-rays, your Honor. It's based on hearsay.

Mr. Erickson: I'll ask you to mark this letter for identification.

(Testimony of Willis E. Smick.)

(Whereupon, report on X-ray examination dated 4-11-51 was marked Defendant's Exhibit No. 32 for identification.)

Q. (By Mr. Erickson): I hand you identification 32, and ask you what that is?

A. This is a written report of X-ray examination of Thera [282] Phillips taken on 4/11/51 at the request of Dr. W. E. Smick, and there is an examination report, and at the bottom it's signed by the roentgenologist, Augustus F. Galloway.

Q. Do you recognize the signature?

A. Yes, it's the same as the one taken on 9/11/50. The signature is the same.

Q. And I'll ask you whether or not identification 32, the letter, accompanied the X-rays?

A. Yes, it always accompanies the X-rays.

Mr. Erickson: I resubmit the X-rays.

The Court: Let counsel see the letter.

Mr. Wolff: Regardless of what's in the letter, I don't think it's proper to be admitted at this time. It's only hearsay. As a matter of fact, by reading the letter it's even more so; it states the opinion, and the man's name is there, and it's purely hearsay.

The Court: The objection may be a technical objection, but I don't believe that the X-ray negatives have been properly identified. That's the risk that you take when the documents and exhibits that you propose to use are not presented at the pretrial conference. That's the time to find out if

(Testimony of Willis E. Smick.)

there's going to be objection, and no disclosure of these were made at the pretrial conference. [283]

Mr. Erickson: These were taken since the pretrial.

Mr. Wolff: I have no objection to their being presented, because I think they are entitled to bring in what they found later, but I don't think they're qualified or admissible under the rules.

The Court: I'll sustain the objection.

Mr. Erickson: Then we'll call Dr. Galloway. I don't know how soon we can get him.

The Court: Well, I'll permit the doctor to testify with reference to these X-rays, with the understanding it will be connected up later by bringing the roentgenologist who has taken them.

Q. (By Mr. Erickson): Referring to these identifications 28, 29, 30 and 31, what would you say was the present condition of her right and left ankles?

Mr. Wolff: Let the record show that our objection should stand to these questions unless they are later——

The Court: Yes. Have you ever seen these X-rays?

Mr. Wolff: I don't care to see them.

The Court: Did they let you know they had taken them, or give you an opportunity to submit them to your doctor?

Mr. Wolff: They told Mrs. Phillips they wanted her to submit to an examination, and we agreed

(Testimony of Willis E. Smick.)

that she would. We have never had an opportunity to examine them. [284]

The Court: As I say, this doctor is here; I'm going to let him testify, and if the X-ray negatives are not properly identified I'll have to strike that portion of his testimony, but while he's here he may testify. There's no need of him coming down again.

Mr. Erickson: You may testify.

A. The A-P and lateral view of the left ankle shows a normal ankle and foot, and the X-ray taken of the right ankle and foot shows an old healed fracture of the internal and external malleolus, and the present position is good; very little if any arthritic change; in fact, there seems to be less in this picture than there was in the picture taken on September 11, 1950.

Q. Has there been a good union of the fracture, Doctor, or not?

A. An excellent union. The position was very good considering the type of fracture it was.

Q. Why do you say that the union has been good?

A. Well, this type of fracture with this individual being such a heavy person, it many times is hard to hold the fragments in good position, and a person has to look several times at this X-ray to see any evidence of an old fracture.

The Court: I might say for the record, that while the Court looked at one of these X-ray negatives that [285] hasn't been admitted in evidence,

(Testimony of Willis E. Smick.)

there's been no prejudice, because I couldn't make head nor tail of it; I might as well have been looking at the blank wall. Go ahead, Doctor.

Q. (By Mr. Erickson): Would you say as the result of your two examinations that Mrs. Thera Phillips, the plaintiff in this case, suffers any permanent partial disability, or not?

A. From the X-ray evidence, you say?

Q. From all the evidence of your examinations, both X-ray and otherwise.

A. I would say that there is a minimal, because of the history of the fracture in this area, which is rather serious, I'd say she has a permanent partial disability of 5 per cent, approximately. This figure is based on total disability evaluation of \$10,000. Five per cent of that.

Mr. Wolff: I object to the latter, as to the amount.

The Court: Yes, I think that's improper, and should be stricken.

Mr. Erickson: That's all; you may examine.

The Court: The 5 per cent may stand, but as to the evaluation of what that would amount to, that will be disregarded. Did you say 5 to 8 per cent, Doctor? [286]

A. No, just 5 per cent.

Mr. Kelley: Will your Honor pardon me? I didn't catch what he was talking about; the \$10,000 I know your Honor has said that will be stricken, but I would like to know what he said.

(Testimony of Willis E. Smick.)

The Court: He started to compute what 5 per cent of \$10,000 would be.

Mr. Kelley: Oh, I see, that figure is based on the total disability?

The Court: Yes. All right, go ahead and cross-examine.

Cross-Examination

By Mr. Wolff:

Q. Doctor Smick, you know what Mrs. Phillips weighs, do you?

A. Approximately between 236 and 240 pounds.

Q. And you know that's been her weight for a long time?

A. I would say according to my history which I took it has been for some time that way.

Q. Many years? A. Years, yes.

Q. Do you know, Doctor, that she suffered a dislocation of this ankle? A. When?

Q. On the 28th of January, 1949.

A. Well, with any fracture there probably is a little bit of dislocation, I don't care what kind it is; a fracture near [287] a joint, I mean.

Q. Pardon?

A. In a fracture near a joint, if there is a separation of the fragments at all, why, there is going to be a little bit of joint dislocation.

Q. And so Mrs. Phillips suffered dislocation in this right ankle? Please state your answer audibly.

A. Technically, yes.

Q. She did? A. Yes.

(Testimony of Willis E. Smick.)

Q. Doctor, what is meant when you said that an ankle is palpated?

A. Felt; feel it with your hands.

Q. That it's felt? Oh, when you put your hands on it you can feel what?

A. You feel for fragment crepitation, that is motion, or whether it's warm, cold, and all that.

Q. I see. Now, this fracture and dislocation, did that occur in a weight-bearing joint, Doctor?

A. What's that?

Q. Did this fracture and dislocation occur in a weight-bearing joint?

A. Yes, a weight-bearing joint.

Q. And you did find, Doctor, in September that there was some arthritic change, is that not correct. [288]

A. Suprisingly enough, the arthritic change wasn't very evident in the fracture area; it was in the articulation of the astragalus with the navicular bone, which is a part of the foot, not the ankle.

Q. Just what do mean in layman's language as to that, Doctor?

A. Well, the arthritic changes weren't evident in the fracture site.

Q. You don't mean to say that this arthritic condition had no relation to the break and the dislocation, do you?

A. Being as it is in that region I would say it could possibly be related, but as far as 100 per cent evidence that it was related to that fracture, I can't say that.

(Testimony of Willis E. Smick.)

Q. And you wouldn't say that it was unrelated?

A. I can't say that it is unrelated, either.

Q. As a matter of fact there is nothing to indicate that it is anything but related, is there, in this case? Did you find from your examination that there was something else that would cause that arthritic condition?

A. Well, no.

Q. Now, wouldn't you say, Doctor, in view of your experience and training, that a person of this weight of approximately 240 pounds, suffering the injury Mrs. Phillips did to a weight-bearing joint, would be expected to have considerable pain and suffering in that joint? [289]

A. She could have pain in that joint, yes, weighing that much.

Q. Pardon me?

A. With that kind of weight, yes. She needs extra strong joints and bones to hold up.

Q. That's right. When you took her blood pressure yesterday, Doctor, did you take into account the fact that she had walked the steps from the courtroom, the ten or twelve or fourteen steps that are just outside the courtroom door, several times that day?

A. I let her rest a couple of minutes; I took it first and then let her rest. I repeated it approximately two or three times.

Q. The fact that she did walk those steps had some bearing upon what you found, however?

A. The blood pressure was the same, practically the same as it was in September, 1950.

(Testimony of Willis E. Smick.)

Q. So that appears to be Mrs. Phillips' general condition?

A. Yes. She isn't very healthy physiologically.

Q. She is, you say? A. No.

Q. She is not. The fact there is a good union of the bone does not entirely do away with the question of pain and suffering and disability, does it, Doctor?

A. Those are very important in respect to avoiding pain in a fractured area. [290]

Mr. Wolff: I don't think that answers my question; maybe you didn't understand it. Would you read it, Mr. Reporter?

(Pending question read by the reporter.)

A. That's true.

Q. You know, Doctor, that in connection with this accident she suffered an extensive tear of the joint capsule, ligaments, vessels, and soft tissues of the region, is that not true?

A. That happens in almost any fracture, serious fracture.

Q. Now, the tissues heal by scar tissue, isn't that correct?

A. Or if it's bone tissue it heals by replacement. If it's soft tissue, ligaments and tendons, they regenerate by scar tissue.

Q. And isn't it likely, in view of these facts just set forth, that there would be considerable disability from the soft tissue apart from the bone injury? A. That I don't know.

(Testimony of Willis E. Smick.)

Q. Do you mean that your experience hasn't led you into a question of that type?

A. Not in every case; there isn't that much damage.

Q. But that's one of the probabilities in an injury of this type, is it not?

A. The probability exists, yes, in this type of injury.

Q. And also, Doctor, under the facts relating to Mrs. Phillips' [291] injury, with a dislocation and all of the other factors we've mentioned, is there not more of a possibility of recurrence than if it had been a pure and simple fracture?

A. Recurrence? I don't get what you mean.

Q. Recurrence of the break or the dislocation.

A. In regards to the break re-occurring, we have found that when nature gets through repairing a bone it's even stronger in the area after it's completely healed than it is in the other part of the shaft.

Q. As to the dislocation, however, there is a greater danger of recurrence, is that not correct?

A. That type of structure, the ligaments and tendons does not repair as well as the bone.

Q. And in answer to my specific question, then, your answer is yes? A. Yes.

Q. Did you have occasion to measure the atrophy in her calf, Doctor?

A. No, I didn't measure the calf; I measured the fracture area circumference.

Q. You've indicated what you found on that.

(Testimony of Willis E. Smick.)

Yesterday the word "malingerer" came up here in court, Doctor. Would you say that Mrs. Phillips is malingering?

A. I don't think she's a malingerer deliberately, no.

Mr. Wolff: That's all. [292]

Redirect Examination

By Mr. Erickson:

Q. I think I forgot to ask you, did Mrs. Phillips give you any history of any previous medical treatment that she had taken for this fracture, when you first saw her on September 11, 1950?

A. Oh, yes; she had good treatment down at the site of the accident down there, Dr. Eugene Wiley.

Mr. Wolff: Just a moment; I think what she had might be hearsay.

The Court: Is that what she told you, Doctor?

A. Yes, I have it here in the history.

The Court: Overrule the objection.

A. In the history of her injuries she had a very good medical and surgical care for this fracture, and then she also came to Spokane and had an orthopedic specialist examine and treat this foot in one of the local hospitals here.

Q. Who was that orthopedic specialist?

Mr. Wolff: Just a moment; if that's what Mrs. Phillips told him.

Q. Yes, that's what I'm asking, what Mrs. Phillips told him about it.

A. Dr. A. O. Adams.

Q. And did she tell you how many treatments

(Testimony of Willis E. Smick.)

she had got from Dr. Adams? [293]

A. Yes, she spent a few days in the hospital, and he gave her this manipulation of the foot under anesthesia.

Q. Well, what anesthesia, did she tell you?

A. Penathol, intravenous anesthesia.

Q. Was it sodium penathol?

A. Sodium Penathol.

Q. And what would be the purpose of that, Doctor?

Mr. Wolff: Oh, I—go ahead, no objection.

A. Well, I must say here that also after she gave me this history I went and got the information off of the hospital chart, and in general, sodium penathol anesthhesia is given for short duration surgical or manipulative procedures, and of course it's been used for other purposes. It's known as a—if the mind deliberately is trying to hide anything, the part functions normally, if it's being restricted by the patient's conscience, and in her unconscious state under this anesthesia the part will function and give normal range of motion, as the brain restriction is removed under the anesthesia.

Q. Now, directing your attention to a woman of Mrs. Phillips' age and physical condition, would it be possible for her to climb stairs and to participate in dancing and social functions, assuming that she had no break in the leg, without endangering her health?

Mr. Wolff: Just a moment; I think this should

(Testimony of Willis E. Smick.)

be [294] a part of the direct examination; we're in the redirect, and I don't think it's a proper part of the examination.

The Court: Overruled.

A. Well, with her build and her blood pressure and her strength and everything, as she gets older, any younger person can stand quite a bit of extra body weight, the heart can stand it, but as you go past 40, then is the time to correct any overburdening physical factors such as excessive weight. That's the time to remove it if you're going to avoid a constantly increasing blood pressure, and her blood pressure has reached about as high as anyone who can get around without cardio-vascular impairment.

Mr. Erickson: That's all.

Mr. Wolff: That's all, Doctor.

(Whereupon, there being no further questions, the witness was excused.)

The Court: I've just been thinking about this X-ray business; frankly, I haven't had occasion to go into it, because usually counsel are not quite that technical.

Mr. Wolff: Well, let me say, your Honor——

The Court: These X-rays, it seems to me a line should be drawn some place; a modern doctor may send out and get X-rays one place, a Wasserman another place, do we have to bring all those technicians in here?

Mr. Wolff: No. Let me say I withdraw the

objection, [295] because I don't want to delay this.

The Court: If you want to raise any question about them, that's fine.

Mr. Wolff: No, I withdraw it rather than that.

The Court: The X-ray photographs, defendant's 28 to 31, will be admitted.

(Whereupon, Defendant's Exhibits No. 28, 29, 30 and 31 for identification were admitted in evidence.)

The Court: All right, proceed gentlemen.

CHESTER E. BENJAMIN

recalled as a witness on behalf of the defendant, resumed the stand and testified as follows:

Direct Examination

By Mr. Kelley:

Q. You're the same Chester Benjamin sworn the other day, and who testified in this cause?

A. Yes.

Q. And you are with the Bureau of Reclamation?

A. Yes, sir.

Q. And I've forgotten for the moment, what is your position? A. City Engineer.

Q. And you have graduated from what engineering and architectural firm?

A. I'm a graduate of Trinia, Heath and Gose in Tacoma, which is a private office, training organization at that time. It's been 40 years ago. [296]

Q. How long have you been in the construction business? A. All my active business life.

Q. Some 40 years?

(Testimony of Chester E. Benjamin.)

A. 40 years; started about 40 years ago when I was a sophomore in high school.

Mr. Wolff: We'll admit his qualifications as an experienced engineer; not a graduate, but an experienced engineer.

Q. Thank you. Directing your attention to this proposition of electrical devices, without preliminary question, does, as a general proposition where these electrical devices are used at all on buildings, does ice have to be in close contact with the wire?

A. You're referring now to these heating cables?

Q. Yes.

A. The temperature of the cable is quite low, and requires the ice to be in quite close contact.

Mr. Wolff: I might say if it will shorten matters that we'd even agree that Mr. Benjamin will testify that the electrical gadget we mentioned wouldn't cure the problem at Coulee Dam, if that's what he's about to testify to.

The Court: I think they probably want the details of his testimony.

Mr. Wolff: Not that we agree that's true, but that [297] he would so testify.

Q. (By Mr. Kelley): By the way, directing your attention to the Plaintiff's Exhibit Number 13, can you tell without going into the feet and inches what the degree of the pitch of the roof of that General Store portrayed there is?

A. I believe the whole pitch is between a third and a quarter pitch.

(Testimony of Chester E. Benjamin.)

Q. And what do you mean by a third and a quarter of pitch, for the record?

A. The rise of the roof ridge to the total width of the building.

The Court: I didn't get that last.

A. The proportion of the rise of the roof to the total width of the building.

Q. In other words, this roof rises one-third the width of the building, is that it?

A. It rises at that rate.

The Court: There's a difference in pitch, as I remember looking at it.

A. That's right. This rise, that would be the pitch.

The Court: You're talking about the lower part?

A. Yes, sir.

Q. (By Mr. Kelley): And what significance does this one-third rise of the pitch have, as an engineering proposition?

A. It tends to accumulate the precipitation at the edges a [298] little more rapid than it would if it were flatter. It would influence the freezing rate at the edge by the velocity of the water down the roof.

Q. What influence, if any, would it have in the determination as to the feasibility of putting in an electrical device, a cable and so forth, that's been testified to?

A. It's steep enough to pitch ice across the cables and bridge them, and the cable would not be able to melt the sliding mass of ice as fast as it

(Testimony of Chester E. Benjamin.)

came down. It would therefore cross the cable and probably be at a later time cut off by the melting.

Q. What would be the effect of that?

A. If the ice were not entirely lodged in the gutters it might fall in masses.

Q. If I follow you correctly, the ice could bridge over any wire and melt, causing the ice to fall in chunks and produce even a greater hazard?

A. Not in every wire, but in this case it would do so.

Q. By this case, you mean this General Store Building? A. This building, yes, sir.

Q. On the theory that one picture or sketch, as the Chinese say, is worth a million words, do you suppose you could just indicate a profile on a piece of paper, as to what you mean by that?

A. You want a profile of the section of the roof at that point? [299]

Q. Yes.

(Whereupon, the sketch was marked Defendant's Exhibit No. 33 for identification.)

Q. Directing your attention to that picture, exhibit 13, does it indicate a downspout?

A. There. It indicates one of the downspouts. There are a number of them.

Q. And by the way, state whether or not the downspouts on that General Store Building, are they exposed to the air?

A. Yes, as far as the sidewalk.

Q. And then what happens to them?

(Testimony of Chester E. Benjamin.)

A. Then they turn under the sidewalk to the curb.

Q. Are there any storm sewers in Coulee Dam?

A. Not at that time there weren't. There are some new ones being built now; not at that location, however.

Q. I believe you testified in response to counsel's question that you're also the building inspector down there?

A. Yes.

Q. At least you're familiar with the buildings——

A. Yes.

Q. ——in your line of duties. Do you know that in this winter of 1949 there were other buildings at Coulee Dam that had this same problem of ice and snow on the roof and the eaves?

A. I think there were a number of [300] buildings.

Q. Well, now, I wonder just for the record, without going into detail, if you can enumerate some of them?

A. I had trouble at the Recreation Hall, the Columbia Motors Building, the Administration Building, the warehouse, United States Post Office Building, and there were a number of others, but those are the principal ones.

Q. Any schools?

A. I didn't have too much trouble in that regard with the schools.

Q. Hotels?

A. The hotel, I had some trouble.

Q. Theatre?

(Testimony of Chester E. Benjamin.)

A. The theatre, I had some trouble.

Q. And in this weather of the winter of 1949, what tendency did the weather give to this ice problem on the roofs and eaves?

A. You mean did it aggravate it?

Q. Well, yes.

A. It did aggravate it.

Q. Let's get right down to this General Store Building. Handing you Defendant's Exhibit 32 for identification——

The Clerk: That's identification 33.

Mr. Kelley: It has 32 on it.

The Clerk: It should be 33.

Mr. Erickson: I'll ask that 32 be [301] withdrawn.

Q. (By Mr. Kelley): Is that a rough profile of the waterspout there? A. Yes.

Q. And what significance, if any, does the type of construction that is outlined there bear to the feasibility of putting any electrical device in?

A. The amount of ice accumulating on the roofs at such periods is so great that the electrical devices mentioned are not suitable for a building of this size. They are suitable for small installations, and I have some experience with those.

Q. By the way, did you ever try them in any other building there, the Administration Building?

A. Yes, the Administration Building has a set.

Q. How does it work even there?

A. It doesn't work too well. That's just beyond

(Testimony of Chester E. Benjamin.)

the limit of the capacity of the machines to thaw the ice.

Q. Yes.

Mr. Kelley: I just offer this for illustrative purposes in connection with this witness' testimony, if your Honor pleases.

Mr. Wolff: No objection.

The Court: It will be admitted, to illustrate the testimony of the witness.

(Whereupon, Defendant's Exhibit No. 33 for identification was [302] admitted in evidence.)

Q. (By Mr. Kelley): And by the way, going right to this General Store Building, had you had trouble with the ice on the roof before?

A. Yes.

Q. And had you attempted to take out or take off the ice on the roof before Mrs. Phillips' fall?

A. Yes.

Q. And when was this? A year or so before?

A. A year or so before, about a year before.

Q. And just outline briefly to the Court your efforts, what it took to get the——

A. I moved a portable steam boiler, a truck mounted boiler of 25 horsepower capacity, over to the store, and by means of boom trucks and steam hoses I placed riggers and other mechanics up on the roof and along the eaves of the roof, on the boom truck, and thawed the ice off the roof completely.

Q. On what side?

A. Along the north edge of the building.

(Testimony of Chester E. Benjamin.)

Q. Just along the north edge alone?

A. I had a crew of sometimes eight men, always six men, on that crew for about two shifts, two day shifts, to take that ice off. There was about three tons of ice on the eaves. [303]

Q. And that was in 1948?

A. I believe it was the winter of 1948-1949, but I can't remember whether it was before the New Year or afterwards.

Q. Now, this downspout that you've illustrated in exhibit 33, is that exposed to the air?

A. Yes.

Q. Is that the situation with some of the other downspouts? A. Yes, they're all exposed.

Q. I see, and as you've indicated, they go under the gutter there?

A. I'm not certain that they all go under, but I know that some of them do.

Q. Well, if you were to put, or attempt to put live electric resistance wires as has been suggested here in that downspout, what would be your problem?

A. Well, I would have a number of hazards that don't exist with the ice. In addition to the ice hazard, falling ice in larger masses, I would have some risk from damage to the cables and injury to my men from either burning or short-circuit shock.

Q. How about the passerby?

A. The passerby could possibly be injured by the cables in the downspouts; they would have to be thawed as well.

(Testimony of Chester E. Benjamin.)

Q. How about the kids coming from school?

A. Well, any place the cable would be exposed would be a [304] hazard.

(Short recess.)

Q. Mr. Benjamin, can you briefly indicate to the Court what significance, if any, is the fact that there were no storm sewers in Coulee, and you may use, if it will help you, for illustration that exhibit 33, that profile; of what significance is that fact, as to the flow of water?

A. Well, the significance of the fact there are no storm sewers is that the drainage is therefore surface drainage, and any water must either remain water or it will freeze up and pile up in gutters and drains and so forth, blocking any further drainage.

Q. Then particularly with reference to any possible electrical device, if the ice were to be melted by the heat what would happen to it?

A. Well, if enough heat were supplied to melt the ice and keep the downspouts open, it would plug in the drains and curbs and just back up to the gutters and run over as it was before, as water.

Q. You'd still have the problem of the water coming down the downspout to the sidewalks?

A. That's right.

Q. By the way, in cities or places where they do have storm sewers, where are they usually buried with respect to the frost line? [305]

A. We try to keep all sewers, storm and sani-

(Testimony of Chester E. Benjamin.)

tary, below frost line. That's the general practice in this climate, in this latitude.

Q. By the way, how long have you been at Coulee Dam?

A. I went to work at Coulee the 10th of March, 1935; that's 16 years.

Q. Well, at least from the year 1937 state whether or not it's a fact that the winter of 1948-1949 was the most—or the winter of 1949 was the most severe since you've been there with reference to the ice and snow conditions at Coulee?

A. I believe that the winter of 1949 and 1950 was the worst winter, and 1948-1949 would run it a close second.

Q. I see.

A. That is with reference to ice and protracted cold.

Mr. Kelley: You may inquire.

Cross-Examination

By Mr. Wolff:

Q. Mr. Benjamin, what do you mean when you say it was the worst winter? What do you mean by that?

A. Well, from my standpoint, we had more protracted freezing, longer and more continued cold weather, and with above normal amounts of snow-fall.

Q. Have you examined the weather bureau records as to weather at that particular time?

A. Have I? [306]

(Testimony of Chester E. Benjamin.)

Q. Yes.

A. No, I haven't since this trial began.

Q. Don't you realize, Mr. Benjamin, that the fact is that there was only 9 9/10 inches of snow in January, 1949, according to the weather report?

A. That's about twice our normal.

Q. Do you know how much snow there was in December of 1942?

A. Yes, there was a pretty heavy snowfall, but it was not cold.

Q. It wasn't cold?

The Court: I didn't get that last date.

Q. December, 1942. Do you know what the mean temperature was in January, 1949?

A. In January, 1949? The mean temperature would be somewhere in the neighborhood of 17. That's a guess.

Q. All right. Do you know what the mean temperature was in January, 1943? Well, it was 18.6, according to the weather bureau records. Doesn't that sound right to you?

A. Probably. January is our worst month.

Q. So the mean temperature wasn't far off of what it had been of several other years?

Mr. Kelley: What years, please?

Mr. Wolff: I submit he can answer that question.

The Court: If he doesn't know he can say so.

A. I don't think so. [307]

Q. You don't think it was far off from what it was in other years, is that right?

(Testimony of Chester E. Benjamin.)

A. I believe that the mean temperature of 1948-1949 and 1949-1950, coupled with precipitation and duration, was worse than any previous years since I've been at Coulee Dam.

Q. Do you know, Mr. Benjamin, that there had been nothing but a trace of precipitation during the nine days before Mrs. Phillips fell, at least? Nothing but a trace, isn't that right?

A. That's correct. That trace is measured in water content, not in inches.

Q. And there was practically no water content during at least nine days or more prior to the time she fell; that is correct, isn't it?

A. That's probably correct.

Q. Yes, and do you know that there were many winters when there was more than twice as much snow as there was in January, 1949, isn't that right?

A. I wouldn't say many; there may have been a couple.

Q. How long have you been there, did you say?

A. I've been there since the work started on the dam, almost; I'm on my seventeenth year.

Q. All right, let's start with 1937. There was 14.4 inches of snow in that year, if you remember, isn't that correct? [308]

The Court: What time, Mr. Wolff?

Q. January of 1937.

A. That was a pretty cold year.

Q. Yes, that fell that month; that was a pretty cold month, wasn't it? A. Yes.

Q. And February of 1937, do you know it's a

(Testimony of Chester E. Benjamin.)

fact that there was 15.5 inches of snow that fell that month, is that right?

A. That was a bad month.

Q. Do you know that in January, 1943, there was about 7 inches of snow that fell that month?

A. That's six years later, yes.

Q. 1942, take. Do you know that there was nearly 9 inches of snow that fell in December, 1942?

A. Yes, that's about the time we get it.

Q. That's right, so in December, 1942, you had about 9 inches of snow falling; in January of 1943 you had about 7 inches, isn't that right?

A. I don't know.

Q. Well, you don't know what the snowfall was, do you?

A. No. I've been there 17 years. I couldn't check the year against the month and the snowfall. That would be too much to expect of my weak memory.

Q. So you're not too accurate on what the conditions were at that time of the year in comparison with other years? You [309] could be off in your memory, isn't that right?

A. Not too much. I'll tell you why.

Q. Yes.

A. It's part of my business to watch this freezing and snowfall, because I have to take charge of plowing, and my diary indicates when the plowing commenced in most of the years and when the weather got bad and when the temperature dropped, and how long it stayed down. In referring back to

(Testimony of Chester E. Benjamin.)

these points I have a pretty good memory, I would say better than the average, but of course it couldn't equal the record.

Q. All right. Now, Mr. Benjamin, just what is the condition there as to weather that creates the problem you say you have about this water on the sidewalk? What is there about the weather that creates that problem?

Mr. Kelley: During the year 1949-1950, the winter of it?

Mr. Wolff: At any time.

Mr. Kelley: I think he should be restricted.

The Court: Well, he's asking for a general statement as to what creates the problem.

A. The problem, strangely enough, is not created by snowfall nor extremely low temperatures. The problem is created by an atmospheric temperature approximately at the freezing point during the noon hour or the two or three hours each [310] side of noon. If the atmospheric temperature is approximately 32, then the escape of heat from the buildings will melt the water and it will run to the edge. If the temperature then drops to 30 or 28, when it reaches the edge of the building it freezes on the roof and collects there, so it isn't either the amount of snow that falls nor is it the low temperature that causes this particular problem at Coulee Dam.

Q. Well, you knew about that before January 28, 1949?

A. Oh, I've been aware of that for years.

Q. Let's see, you put down flakes on the sidewalk there in the community, don't you?

(Testimony of Chester E. Benjamin.)

A. We don't use very many dow flakes. We don't use any where the sidewalks are through the lawns, but at such a point as the general store we did use them.

Q. What do you use them for?

A. Dow flakes has the faculty of dropping the temperature about 10 degrees freezing point, which means that the ice would then thaw at 32—or might thaw at 22 when it would not thaw at 32 before the dow flakes were put on.

Q. Well, generally you use them to make a sidewalk safe for pedestrians, isn't that right?

A. To melt the ice; correct. We use other things, too.

Q. Was the atmospheric condition there near the General Store Building on the 28th of January, during these few hours of [311] noon time, it was about the same on that date as it had been on several days before, wasn't it?

A. I don't recall any difference; it was probably the same.

Q. And as a matter of fact that situation was the same at that noon time on any year when you had weather conditions where there was a good deal of snow and when there was cold weather, isn't that right?

A. I'm not sure that I understand what time.

Q. Well, let's put it this way; strike the question: During the few hours of noon that you mentioned when you have this atmospheric condition

(Testimony of Chester E. Benjamin.)

that you expected, you had seen that in prior years, had you not? A. Yes.

Q. Isn't it also true, Mr. Benjamin, that you people plowed out the street along Roosevelt Avenue? A. The road plows?

Q. Yes. A. Yes, we do.

Q. And they permit the snow to be piled up on the edge. You had some photographs here. Let's see, I guess these little ones show it better.

Mr. Kelley: For the record, my recollection, if your Honor pleases, they were admitted on pre-trial for illustrative purposes, to show the building and so on. If there's some point to be made as to the condition, we ought [312] to know the time and the day of the month and the year that they were taken, and so on.

Mr. Wolff: Well, I understood that they were admitted, and I understood they were admissible for all purposes.

The Court: Well, as I understand it, they're not intended to show the condition at any particular time, so if there is snow shown in them, it would be simply for illustrative purposes. As I understand, it's not intended to be related to the time of the accident at all.

Mr. Kelley: That was my understanding of the pretrial arrangement. Of course, if he seeks otherwise——

Q. (By Mr. Wolff): Now, isn't it a fact, Mr. Benjamin, referring to your defendant's exhibit 33,

(Testimony of Chester E. Benjamin.)

that snow becomes piled along the edge of the sidewalk near the curb?

A. Yes, the plows push the snow to the side.

Q. And it piles up, doesn't it, at that point?

A. Not the way you've indicated, it doesn't.

Q. Will you indicate how it piles up?

A. Now, that's relative to the scale.

Q. Yes. How high—how far is it from the sidewalk to the roof of the building, Mr. Benjamin?

A. It's a variable distance, as you can see in the picture.

Q. Well, let's say at the point where this gutter happens to be that you've drawn in on your exhibit 33. [313]

A. Oh, I would say that's about 20 feet.

Q. Then you'd say that the pile of snow that you've just indicated there, approximately—well, I suppose that would vary between years, wouldn't it, how much snow was there, as to how high that pile would be?

A. That's correct.

Q. And if there was a lot of snow the pile would be high, and if there wasn't much snow the pile wouldn't be high?

A. That's right.

Mr. Wolff: That's all.

Mr. Kelley: That's all.

(Whereupon, there being no further questions, the witness was excused.)

BESSIE DUMAS

called as a witness on behalf of the defendant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Bessie Dumas.

Q. And where do you live now, Mrs. Dumas?

A. Wenatchee.

Q. And on or about January 28, 1949, what place of business were you operating at Grand Coulee at that time?

A. The Dumas Beauty Salon.

Q. And that is located in the mezzanine of this General Store Building at Grand Coulee? [314]

A. Yes.

Q. And how long had you been operating a beauty salon at that point?

A. I started on August 1, 1947.

Q. Since 1947? A. That's right.

Q. Do you know the plaintiff in this case, Thera Phillips? A. Yes.

Q. And had she been a customer in your beauty salon for some time before that? A. Yes.

Q. Do you remember treating her or fixing her hair or giving her some other treatment on the day that she was injured?

A. One of the girls took care of her that morning.

Q. Did you talk to her when she was in the beauty salon? A. Yes.

(Testimony of Bessie Dumas.)

Q. And that was the same day that she slipped and fell on the ice? A. Yes.

Q. And what conversation did you have with Mrs. Phillips at that time, Mrs. Dumas?

A. Well, just word for word, I couldn't repeat it.

Q. Well, what was the substance of it? What was said about the ice?

A. We did speak about it being slick, about the ice, the icy [315] condition of the street.

Q. That was immediately before she was injured? A. Yes.

Q. And what did you say to her about being careful, and what did she say to you?

A. I said that I was very careful each morning, I was afraid I wouldn't reach the shop without falling, and I did say "You be careful and don't fall."

Q. Did you say anything about her being especially careful or particularly careful?

A. Well, I think I said "Be careful and don't fall." That's all I can remember about that conversation.

Q. Was anything said about her weight, or a woman of her weight being careful about falling?

A. I don't remember that.

Mr. Erickson: That's all.

The Court: You don't tell your customers that they're too heavy, do you? A. No, I don't.

(Testimony of Bessie Dumas.)

Cross-Examination

By Mr. Wolff:

Q. Mrs. Dumas, did you have any other customers that morning?

A. Well, I don't remember whether I did at the time she was there.

Q. During the morning?

A. Oh, yes, I must have. [316]

Q. She wasn't the only person that crossed the ice to come into your place of business, then?

A. No.

Mr. Wolff: That's all.

The Court: Any other questions?

Mr. Erickson: No, that's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Erickson: I believe the record shows that these weather reports were offered by the plaintiff in this case?

The Clerk: No, it doesn't.

Mr. Erickson: Then we'll offer them at this time.

The Court: Have they already been marked?

The Clerk: Yes, in the pretrial they were marked as defendant's identification number 14.

Mr. Wolff: Unless we've committed ourselves previously, and I don't remember it, we would object to the introduction of those in evidence unless it can be shown—not as to their authenticity

nor as to being true copies—but unless they can be identified as relating to the same conditions as the General Store Building. Some weather reports are made some place, and some are made another, and unless they are tied in to the conditions at the General Store Building I don't think they're admissible. [317]

Mr. Kelley: Well, it's a matter of probative value.

The Court: They simply were identified at the pretrial conference, as I remember it.

Mr. Wolff: The pretrial order states, your Honor——

The Court: Yes, that their authenticity is not questioned.

Mr. Wolff: But reserving all other objections to the admissibility.

Mr. Kelley: I haven't heard any grounds urged to the Court with respect to the competency, relevancy or materiality. I assume the probative value would be a matter to be considered in argument.

Mr. Wolff: Well, I say, your Honor, certainly a weather report from Spokane would not have any probative value, and unless these are shown to be under the same conditions as at the General Store Building they wouldn't have probative value.

The Court: I was trying to see from the reports themselves; we must assume they are authentic and that they are what they purport to be. Do they show what the station was here?

Mr. Erickson: Yes, Coulee Dam station.

The Court: Have you any evidence or could you

agree as to where these are taken, how far from the store. Have [318] you got anybody who knows that, knows the location of the weather bureau? Don't talk to me; just talk to counsel. We don't want anything informally coming in here. My thought was if it can be shown where the weather station is, then it can be shown.

Mr. Kelley: I think it all bears on their probative value.

The Court: Well, I rather think so.

Mr. Kelley: In other words, the plaintiff's counsel didn't say "Well, you didn't have the weather bureau right near the place where she fell; it might have varied." That's always a matter of legitimate argument.

Mr. Wolff: If they were admitted on that basis it would put the burden on us to prove they were not the reports under those conditions.

Mr. Erickson: For the purpose of the record we are prepared to state that these are taken about one mile, the weather station is about one mile from the store building.

Mr. Wolff: Do you know the difference in altitude between that place and the store building?

Mr. Erickson: Yes, this is several hundred feet higher, the weather station.

Mr. Wolff: Well, then I think they're clearly not admissible.

The Court: Well, I'll admit them with that understanding, [319] that it may be argued as to whether they do show accurately the condition there at the store building.

(Whereupon, Defendant's Exhibit No. 14 for identification was admitted in evidence.)

Mr. Erickson: Please the Court, I think we're just about ready to rest, but we want to offer and have the deposition of Phil Nalder read into the record. It's already been published in chambers at the time of the pretrial.

The Court: Is that all you have, then, practically?

Mr. Erickson: Yes.

The Court: How long will that take?

Mr. Erickson: That will take perhaps 25 or 30 minutes to read that into the record; it's somewhat of a lengthy deposition.

Mr. Wolff: We'd object to the introduction of that deposition, your Honor, under the rule it must be shown that the witness is more than 100 miles from the place of trial, or one of the other grounds, and I'm sure that Mr. Nalder could be here; he's within 100 miles. We checked that because we were interested in reading Mr. Benjamin's deposition, but had to go to the expense of bringing him here.

The Court: I had some talk with the clerk after the pretrial conference. I was under the impression Coulee Dam [320] was more than 100 miles away. I don't know, of course; I don't believe it's a matter of which I can take judicial notice; whether I can theoretically, actually I don't know how far it is.

Mr. Kelley: There's another phase of the matter I think your Honor would like to hear about in the exercise of discretion. My recollection of the ar-

rangement at the pretrial was that as far as the depositions were concerned they were published. I had a phone call from counsel some time ago about these depositions, and I told him in effect I wouldn't be making any objection to them at all. I anticipated that he probably wanted to save the expense of witnesses and so forth, but in any event I talked with Mr. Erickson a few days ago and said "Well, what's the meaning of this phone call; is there some technicality about this? We shouldn't object to them, should we?" and Mr. Erickson said by no means; and I said "Well, we won't bother to bring them up here, then." Now, that's the situation we're in.

Mr. Wolff: You don't mean, Mr. Kelley, that you and I discussed whether Mr. Nalder should be brought to court?

Mr. Kelley: No, I don't mean that.

The Court: It's unfortunate, and I'm not trying to place the blame on anybody here; it's my oversight as well [321] as anybody else's; it's unfortunate that we didn't discuss it at the conference. I had just assumed that Coulee Dam was more than 100 miles away, but apparently there's some question about it.

Mr. Wolff: We were quite interested in that point, and wanted very much to use Mr. Benjamin's deposition rather than spend the witness fees to bring him, but we were convinced it was more than 100 miles and that was the only way to get him here.

The Clerk: Less than a hundred miles.

Mr. Wolff: Yes, less than a hundred miles.

The Court: Have you inquired of the Marshal's office what the mileage is?

The Clerk: I haven't inquired of the Marshal's office, your Honor, but I have a table that I compiled setting out the mileages from the different towns, through the assistance of the Triple A, and with road maps, and I think it's been recognized by Washington, at least in paying witnesses, and I've checked that, and on Mason City, as it was known at the time that I compiled it, and that's across the river where this store building is, and it shows 95 by automobile road, and the railroad of course is longer than that. By way of Coulee City it would be approximately 115 miles, according to my mileage table, but this route is from Spokane through Wilbur and taking [322] the road that branches off the highway west of Wilbur and turns north and then angles northwest to where you come over the top of the hill looking down into Grand Coulee. That's the route that shows 95.

The Court: I think the Court can take judicial notice of distances between places in the district, and I think the rule applies to the nearest usual route of travel by automobile highway, or by public highway, rather, from Spokane to the place where the witness resides. Now, there hasn't been any agreement about the matter that's definite enough to dispense with the rule or to enable me to receive the deposition, unless the rule is complied with. I don't wish to deprive either side of any evidence that they might consider relevant or helpful to the court in deciding the controversy, so that if the

deposition cannot be used, I certainly would be inclined to give the defendant time to bring the witness in here, even if we had to wait until tomorrow morning to do it. That's a matter for you to decide, of course. If we can get through with the testimony I'd hear your arguments this afternoon, but I have nothing tomorrow, and as I hadn't any particular fishing excursion in mind I have no objection to hearing your arguments tomorrow before noon. I prefer to get through by noon on Saturday if possible, but we can finish tomorrow. I'm going to recess until [323] 2 o'clock, and in the meantime you can make your plans in this matter. We can continue until 5 or even beyond that if it's necessary, to finish this afternoon.

(Noon recess.)

Friday, April 13, 1951

(All parties present as before, and the trial was resumed.)

Mr. Wolff: I might say, your Honor, during the noon hour I re-read the Nalder deposition, I hadn't for a while, and we have no objection now if they want to introduce it.

Mr. Kelley: I would have appreciated the courtesy of that statement an hour or two ago, when we could have got Mr. Nalder, but this is a sort of an off again on again Finnegan proposition. We have decided it will not be necessary to put on that deposition, if I can recall Mr. Benjamin.

The Court: All right.

CHESTER E. BENJAMIN

recalled as a witness on behalf of the defendant, resumed the stand and testified further as follows:

Direct Examination

By Mr. Kelley:

Q. I believe you have been sworn. Mr. Benjamin, in connection with exhibit 14, the weather reports, state to the Court if you know where the building known as the old concrete [324] laboratory is with reference to the General Store Building, in discussion in this case as shown in exhibit 12?

A. The old concrete laboratory was formerly located about 600 feet west of the General Store.

Q. And directing your attention to the exhibits, there were some of those weather reports taken at this old concrete laboratory?

A. Yes, they were taken there, some of them.

The Court: Do they indicate——

Q. Yes, I was going to ask him next, do they indicate on the documents which one?

A. Yes.

Q. And by what designation as to county?

A. Those in the old concrete lab are designated in Okanogan County.

Q. And those taken in the old concrete laboratory and designated in Okanogan County, do the records show there at what elevation they were taken?

A. I believe they do, but I can't——

Mr. Kelley: Pardon me a minute; I haven't

(Testimony of Chester E. Benjamin.)

talked with this witness. Will your Honor excuse me just a minute?

The Court: Yes, that's all right.

Q. (By Mr. Kelley): Directing your attention to the top of that exhibit there, and specifically to the space opposite the [325] printed word "elevation," what do the ones with respect to Okanogan County show the elevation to be?

A. These in Okanogan County are taken at elevation 1087.

Q. Now, let me ask you, were other weather reports in exhibit 14 taken elsewhere?

A. Yes, there were some of these taken in Grant County.

Q. All right. Now, where is the left switch yard?

A. The left switch yard is in Grant County.

Q. And how far is that from the General Store Building?

A. Oh, about a mile, I would say, airline.

Q. And directing your attention to the elevation on those portions of exhibit 14, that is, the ones labeled Grant County, what is the elevation?

Mr. Wolff: Just a minute, now. If the witness is testifying of his own knowledge, I have no objection; if he's merely reading what he finds——

Mr. Kelley: I'm reading this to expedite now. It's on the report itself.

The Court: Well, I'll permit the witness to point them out, because it would take me quite a while to search them out.

A. I know the elevation is 1700 feet at the

(Testimony of Chester E. Benjamin.)

switch yard, but I'm not sure that I can find it on the sheet.

Mr. Wolff: I'll stipulate that those papers show an elevation of 1700 feet at the switch yard, if that's the [326] point.

Q. Very well, we'll pass on. Now, in the third place, Mr. Benjamin, does this difference in elevation make any difference, for example, when the Bureau is dealing with government contractors?

Mr. Wolff: Just a moment——

Mr. Kelley: This is preliminary, if your Honor pleases; I'll tie it up in a moment.

A. No, it makes no difference.

Q. Do you have applications for extension from government contractors because of weather conditions and so on? A. Yes, we do.

Q. And the Bureau makes no distinction between these two points? A. No.

Q. That is, the left switch yard and the old concrete laboratory? A. No.

Mr. Kelley: You may inquire.

Cross-Examination

By Mr. Wolff:

Q. You don't contend, Mr. Benjamin, that the weather is always the same at the two points, do you?

A. It would be hard to tell any difference by looking at it.

Q. Well, you don't mean to say it is the same at the two points, do you? [327]

(Testimony of Chester E. Benjamin.)

A. No, there is a slight difference.

Mr. Wolff: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Kelley: That's the defendant's case, if your Honor please.

The Court: All right; do you have any rebuttal?

Mr. Wolff: We have no rebuttal.

The Court: Are you ready to proceed with argument?

Mr. Kelley: Just simply for the record, at this time, both plaintiff and defendant having rested, the defendant renews its motion for a non-suit and challenges the sufficiency of the evidence, on the grounds hitherto urged, to indicate no liability on the part of the defendant, and that the evidence affirmatively shows contributory negligence on the part of the plaintiff.

The Court: The motion will be denied, and the Court will consider the questions that it raises on the merits and all the evidence.

(Whereupon, counsel for the plaintiffs and the defendant presented their final arguments to the Court.)

Court's Opinion

The Court: I think as is usually the case, and more often than not the case, the difficulty is [328] not so much the applicable law as it is its applica-

tion to the facts and circumstances of the particular case.

It's my view that this act, the Tort Claims Act, under which this action is brought, by its language makes the United States liable where a private person would be, that we have or should consider this case as though the government were a private landlord and the accident had happened and the claim was presented in court against that private person, and when I say person, I think that we should make the analogy more apt, we must think of the government as a corporation rather than a private individual, because the United States can act only through agents, and the doctrine as I understand it of respondeat superior applies in these tort claims actions the same as it would in a private action, and if it's the duty of the government to do something through some of its officers, agents, or employees, and they negligently omit to do what the government is duty bound to do, there is liability under the Act, and we mustn't overlook the fact that it covers omissions as well as affirmative acts, so that if an individual who represents the government and within the scope of his duties come the doing of a certain thing, and he omits to do it, he is acting within the scope of his authority, or he is omitting to act in a matter which would be within the scope of his authority, and the [329] government is liable.

Now, looking at the case in that light, it's my view that there was here an omission which resulted in the accumulation of water on the roof of this

General Store Building that artificially discharged it down on the sidewalk below, causing it to form into ice and creating a dangerous situation. The ice didn't come there naturally; it didn't fall, from the heavens, in the form of snow or sleet or rain; it came off the roof, and if the roof hadn't been there the ice wouldn't have been there on the sidewalk, and I think under the McGoldrick-Sanderson case and the principles stated there, we have a case where there has been an artificial discharge and accumulation of water that forms into ice upon the public thoroughfare or public sidewalk, and I think that since the government was maintaining the building, and it was its duty to maintain it, that this situation could have been avoided by the exercise of reasonable diligence.

The fact that it might have been difficult or that it might be questionable as to what the best method employed would be, I don't think is material here. Perhaps it wasn't feasible under the circumstances to run a heating cable with low heat generation, not sufficient to cause fire, as I understand it, or to transmit electric shocks of any seriousness. Whether that was feasible or not, [330] certainly it isn't necessary to maintain a building in such a way that the water falls on the sidewalk, because you can build a roof over the sidewalk if necessary; that situation can be avoided and usually is avoided in the building and maintenance of buildings which project over sidewalks.

I'm not impressed by the argument that the

beauty parlor operator may have had the duty to maintain that roof. There isn't anything in evidence to justify that. The evidence affirmatively shows that the beauty parlor operator leased only a portion of the mezzanine floor. Of course, the roof covers not only the mezzanine, but the entire building, the ground floor and the mezzanine, and this beauty parlor operator had only a small portion of the mezzanine, and even the stairway that extended to her place also served a larger area occupied by a government agency and led to the hall used commercially by the government in letting it out from time to time.

Now, I think that under the circumstances here, since there was this condition that caused the ice to form in the gutter, overflow the gutter and fall down on the sidewalk, that since it was an artificial accumulation and discharge, that the government had the duty of counteracting the dangerous situation, and I'm not going to be too specific as to how I think that could have been done. [331] As I say, I think if no other method was available the eaves could have been extended over the sidewalk, or sand could have been thrown on the ice during the times it formed there, to make it safer for pedestrian travel.

Now, in the matter of this being an unusual winter, I think perhaps the testimony does justify the assumption here that this was a colder, more severe winter than usually occurs at this particular place, probably colder and more severe than all but one or two of the winters there in the last ten years, but

the difficulty is that according to the defendant's own witness here, Mr. Benjamin, this condition wasn't caused by extremely cold weather; this condition was caused by snow falling on the roof, and then melting, particularly during the middle of the day when the temperature was slightly above freezing, and then the temperature would go a little below freezing, down, as I think he said, about 20 degrees, perhaps, then it would freeze and accumulate in the gutter and cause the melting from the roof to overflow. It was a building without insulation, I think the testimony shows, and the heat escaping from inside would melt this snow on the roof, and this condition did exist, according to the testimony here, and the evidence, it existed with the knowledge of the government people up there in prior years. It had existed for an appreciable time before Mrs. Phillips fell [332] on the ice; at least for several days, there is testimony here.

There isn't any indication that this was a sudden catastrophe that descended on the Grand Coulee area. It was perhaps a little colder than it had been, but it was the same sort of thing that had been happening in prior winters, and happened before this particular January 28 in the same winter, and as I say, I can't see from the testimony where the problem would have been any different if the temperature was zero or ten below zero than if it was twenty above, because the accumulation would be precisely the same and the problem the same, perhaps even greater where the temperature was milder during the day.

Now, as to the question of contributory negligence, it's true that Mrs. Phillips knew and should have known, and I think the testimony shows did know of the dangerous condition of the sidewalk, but it was the only way afforded for her to go up to the beauty parlor in the exercise of her affairs. She had a right to patronize this place; it was open to the public, it was open inferentially, there was no barrier to show it should not be used, there wasn't anything to indicate there was any great likelihood or at least the certainty of injury if she used it, and I think she was justified in using it, but in the exercise of proper caution and care. I tried to pay particular [333] attention to her testimony, and it I think is the only direct evidence we have as to the manner in which she fell and what happened at the time she put her foot down there coming out of the entry-way and slipped and fell on the sidewalk, and there isn't any evidence as I recall that she stumbled on any ridge of ice or that she stepped on any broken icicles or that her fall was caused by any particular thing that she could have avoided if she had seen or looked at it and put her foot six inches one way or the other. What she did, she put her foot on that icy surface, that caused her to fall, and the only way I could see that she could have exercised reasonable care is to get down on her hands and knees and crawl across, and there isn't any such requirement in the use of a public thoroughfare, so I don't think there's any contributory negligence here.

Now, in the matter of the allowance for her in-

jury, I always have great sympathy for juries when I come to this particular point in a lawsuit, because it is a very, very difficult thing to say how much somebody shall have for a serious and substantial injury. It must of necessity be somewhat arbitrary in the sense that there isn't any definite yardstick you can follow, and that difficulty is even greater here where the plaintiff, or the principal plaintiff, the injured person, is a housewife and there [334] isn't shown lack of earnings or earning capacity which forms more or less of a definite yardstick.

Of course, she's entitled to substantial recovery, but the evidence here, while it indicates a permanent partial disability, indicates that her disability is from, as has been stated here, 5 to 10 per cent. I think her doctor said 5 to 10 per cent, and the doctor who testified for the defendant, 5 per cent. However, she has had considerable pain, she has a disability without any question, a permanent disability that very materially interferes with her activities, housekeeping and other activities as she testified.

Now, I might say this, that in the matter of pain and suffering, there again we have a situation where it's extremely difficult. No one would want to go through an experience for money where they have an injury of this type, and yet whether the defendant is the government or a corporation or a private individual, the court must as best it can fix the compensation or fix the award on a compensatory basis. It's not supposed to be what the person would go through the experience for, but what is fair as

a compensation, as nearly as we can arrive at it as between the plaintiff and the defendant.

I think taking into consideration the medical testimony and the other testimony of the plaintiff, and all the [335] facts and circumstances in the case, that the plaintiff should have \$3,000 for her permanent injury, and I'll allow an additional \$1200.00 for her pain and suffering, and \$1200.00 for her husband for the damage that has resulted to him by reason of his wife's past and future disability, and the special damages as they're shown here by the evidence, doctor bill and hospital bill and so on.

Now, in the matter of an allowance of attorney fee, I think 20 per cent should be allowed, because that is the maximum provided by the statute, but here the attorneys for the plaintiff have gone all the way through preparation and pretrial and trial, so that they have gone the whole course here, and I can't conceive of any situation where attorneys would be called upon to do more or would be entitled to a larger percentage than they are, so I will allow that from the award, that is, a 20 per cent attorney fee.

(Whereupon, this cause was [336] adjourned.)

Reporter's Certificate

United States of America

Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That I am the duly appointed, qualified and acting official

court reporter of the United States District Court for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, United States District Judge, held at Spokane, Washington, on April 11, 12 and 13, 1951.

That the within and foregoing transcript, consisting of typewritten pages numbered 1 through 337, including this page, is a true, accurate and complete transcript of the proceedings had therein, excepting only the final arguments of counsel.

Dated this 21st day of September, 1951.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed September 24, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the original.

Complaint.

Summons.

Motion to Dismiss and Affidavit of Mailing.

Motion to Quash.

Notice of Association of Counsel.

Notice of Appearance of William V. Kelley.

Order denying defendant's Motion to Dismiss.

Motion for Physical Examination.

Objections to Motion for Physical Examination.

Order denying Objections to Motion for Physical Examination.

Answer.

Motion for a more definite statement.

Stipulation continuing hearing on motion.

Order requiring more definite statement.

Amended Answer and Affidavit of Mailing.

Stipulation in re cross-interrogatories.

Notice of taking deposition on written interrogatories.

Motion to strike from second affirmative defense.

Order for pre-trial conference under Rule 16.

Notice of Examination of Documents and Deposition upon oral examination.

Deposition subpoena to testify—Phil Nalder.

Deposition subpoena to testify—C. E. Benjamin.

Deposition subpoena to testify—Alfred Darland.

Deposition subpoena to testify—Torloff Torkelson.

Notice of filing documents and depositions on oral examination.

Depositions of Thoralf Torkelson, Chester E. Benjamin and Philip R. Nalder. (Published at pre-trial conference, but not read into the evidence at trial of the case.)

Reply.

Notice of filing deposition of Dr. Eugene D. Wiley.

Letter dated April 3, 1951, Lionel E. Wolff to
Aram A. LaFramboise, Clerk.

Order on pre-trial conference.

Subpoena, Dr. Willis E. Smich, Bessie Dumas,
Sgt. James W. Gee.

Subpoena, Sgt. James W. Gee.

Transcript of Proceedings at Trial (not attached
but enclosed herewith).

Exhibits (not attached but enclosed herewith).

Plaintiff's 1—Bill for Drugs.

Plaintiff's 2—Hospital Bills.

Plaintiff's 3—Doctors' Bills.

Plaintiff's 4—Bill for physiotherapist.

Plaintiff's 5—Anesthesiologist's Bill.

Plaintiff's 6—Clothing Bills.

Plaintiff's 7—Draft of floor plan of building.

Plaintiff's 8, 8-a to 8-h—Photos of building
and sidewalk and street.

Plaintiff's 9—Letter, Nalder to Wolff,
11/23/49.

Plaintiff's 10—(Rejected.)

Plaintiff's 11—Telephone bills (tool charges).

Plaintiff's 12—Photo of north side of build-
ing.

Plaintiff's 12—Photo of building and area.

Defendant's 14—Weather report—1936 to
1949.

Plaintiff's 15—Lease, USA and Dumas,
6/23/47.

Plaintiff's 16—(Not offered.)

Plaintiff's 17—Daily Labor Reports, 1/3/49
to 1/28/49.

Plaintiff's 18, 18a—Galoshes worn by Mrs. Phillips at time of accident.

Plaintiff's 19, 19a—Shoes worn by Mrs. Phillips at time of accident.

Plaintiff's 20—X-ray of ankle, 1/28/49.

Plaintiff's 21—X-ray of ankle, 1/28/49.

Plaintiff's 22—X-ray of ankle, 1/29/49.

Plaintiff's 23—X-ray of ankle, 1/29/49.

Plaintiff's 24—X-ray of ankle, 2/25/49.

Plaintiff's 25—X-ray of ankle, 2/25/49.

Plaintiff's 26—X-ray of ankle, 3/18/49.

Plaintiff's 27—X-ray of ankle, 4/8/49.

Defendant's 28—X-ray, right ankle, Mrs. Phillips, 4/11/51.

Defendant's 29—X-ray, left ankle, Mrs. Phillips, 4/11/51.

Defendant's 30—X-ray, right ankle, Mrs. Phillips, 4/11/51.

Defendant's 31—X-ray, left ankle, Mrs. Phillips, 4/11/51.

Defendant's 32—(Withdrawn.)

Defendant's 33—Sketch by Benjamin.

Defendant's Proposed Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Judgment.

Memorandum of Costs and Disbursements.

Notice of Appeal.

Order extending time to file and docket Record on Appeal.

Designation of Contents of Record on Appeal.

Plaintiff's Designation of Additional Contents of Record on Appeal.

on file in the above-entitled cause, and that the same constitute the record for hearing of the Appeal from the Judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for by the Appellant in his Designation of Record, and by the Appellee in his Designation of Additional Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 27th day of September, A.D. 1951.

[Seal] /s/ A. A. LaFRAMBOISE,
Clerk, U. S. District Court.

[Endorsed]: No. 13117. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Homer C. Phillips and Thera Phillips, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed October 1, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13117

UNITED STATES OF AMERICA,

Appellant,

vs.

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Appellees.

STATEMENT OF POINTS RELIED
UPON BY APPELLANT

Comes now the appellant and, pursuant to the provisions of Rule 19(6) of the Rules of the Court of Appeals for the Ninth Circuit, files the following concise statements and points upon which it intends to rely on appeal:

1. The court erred in Finding of Fact No. 4, especially in that part of the finding in which the court found that negligence was proved against the United States and its servants, agents and employees in the maintenance of the building and premises.

2. The court erred in not holding that the plaintiff was guilty of contributory negligence.

3. The court erred in not holding that accumulation of snow and ice was the result of unprecedented weather conditions and was not caused by any act or employee of the Government. The court should

have held that the accumulation of snow and ice resulted from an act of God and not as a result of any servant, agent, or employee of the United States.

4. The court erred in entering judgment against the United States in any sum.

5. The court erred in the admission of certain testimony and exhibits properly objected to.

Dated this 10th day of October, 1951.

/s/ HARVEY ERICKSON,
United States Attorney;

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 12, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF
RECORD TO BE PRINTED

Comes now the appellant and designates the following portions of the record to be printed in conformity with Rule 19 of this Court:

Complaint.

Amended Answer.

Order for Pre-Trial Conference.

Notice of Examination of Documents and of
Deposition Upon Oral Examination.

Reply.

Order on Pre-Trial Conference.

Findings of Fact and Conclusions of Law.

Judgment.

Reporter's Transcript of All Testimony.

All Exhibits.

Notice of Appeal.

Order Extending Time to File and Docket Record
on Appeal.

Appellant's Designation of Portions of Record to
Be Printed in Conformity with Rule 19.

Dated this 25th day of September, 1951.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,

Assistant United States Attorney, Attorneys for
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 27, 1951.

No. 13,118

IN THE
United States Court of Appeals
For the Ninth Circuit

CECIL LEE DAVIDSON, also known as
Jack Reynolds,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

LESLIE C. GILLEN,

400 Crocker Building, San Francisco 4,

CLIFTON HILDEBRAND,

830 Bank of America Building, Oakland 12,

Attorneys for Appellant.

FILED

FEB 18 1952

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No. 13,118

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CECIL LEE DAVIDSON, also known as
Jack Reynolds,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

By indictment filed in the United States District Court for the Northern District of California, Southern Division, appellant and others were charged with the crime of conspiracy, within the jurisdiction of that court, in violation of 18 U.S.C., sec. 371, and 18 U.S.C., sec. 2401. CT 1-3. The District Court had jurisdiction. 18 U.S.C., sec. 3231; Rule 18, Federal Rules of Criminal Procedure. On conviction thereof appellant was sentenced to imprisonment and fined by final judgment made and entered August 23, 1951. CT 168-169. Notice of appeal to this court was filed August 23, 1951. CT 173. The appeal was timely. Rule 37(a), Federal Rules of Criminal Procedure.

Jurisdiction of this court to review the final judgment of the District Court is sustained by 28 U.S.C., secs. 1291, 1294.

STATEMENT OF THE CASE.

The indictment (CT 1-3), presented in open court on April 18, 1951 (CT 3), charged that "on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951", Edward J. Carrigan, Ray Calmes, Sam Neider, and this appellant, as defendants, conspired together and with Phil Davis and John Church, to defraud the United States in the exercise of its governmental functions by unlawfully attempting to influence, obstruct, and impede the Attorney General and the Bureau of Prisons in the designation of the places of confinement and transfer where Phil Davis, a Federal prisoner convicted of violating the Motor Boat Act of 1940 was to serve his sentence of six months imprisonment. CT-2. Five overt acts occurring between January 27, 1951, and April 12, 1951, were alleged, each overt act being directed at a separate defendant. The overt act ascribed to this appellant was as follows (CT 3):

"3. On or about February 10, 1951, said Phil Davis had a conversation with said defendant Jack Reynolds near the Union Club of Oakland, 285-23rd St., Oakland, California."

At the conclusion of the government's case the court granted a judgment of acquittal in favor of defendant Neider, on July 30, 1951. CT 12-13. Ap-

pellant's motion was denied. RT 737-739. The jury found defendants Carrigan and Calmes and this appellant guilty on August 4, 1951. CT 151. Appellant's motion for new trial (CT 154-156) was denied August 23, 1951. CT 162. By Judgment and commitment on August 23, 1951, appellant was sentenced to imprisonment for 3 years and fined \$3000. CT 168-169. His notice of appeal was filed the same day. CT 173.

The record is voluminous and includes eleven volumes, the first volume containing the clerk's transcript (CT) and the other volumes containing the reporter's transcript (RT). The facts are long and involved and hardly susceptible of condensing within the scope of a proper statement of the case. And various factors increase the difficulty where, as here, the statement of the case is on behalf of one of the defendants.

One factor is that part of the testimony came into the record under rulings of the court limiting it to the case against defendants other than this appellant. This is particularly true of testimony given by Church, an alleged conspirator, who appeared as the first witness for the government and testified at length concerning statements and declarations made to him by various defendants. Another factor is that testimony of government witnesses Church and Davis, another alleged conspirator, respecting statements and declarations made by defendant Neider was expunged as evidence by a ruling of the court at the time

Neider's motion for judgment of acquittal was granted. RT 741-742. And still another factor is that testimony of government witnesses respecting alleged statements and declarations of defendant Carrigan after he was apprehended was limited by rulings of the court to the case against defendant Carrigan. RT 665.

At the outset, a brief introduction to the personnel of the alleged conspiracy or conspiracies, and a brief insight into the inter-acquaintanceships of the alleged conspirators, may be of some assistance to the court.

Phil Davis, named as a conspirator but not as a defendant (CT 1-3) lived in Alameda County and owned an automobile agency in Oakland. RT 227-228. By judgment and commitment dated November 7, 1949, the United States District Court, at Sacramento, sentenced him to imprisonment for six months for violating the Motor Boat Act of 1940 (46 U.S.C., sec. 526), the offense charged being that of reckless and negligent operation of a motor boat. RT 17-18. The offense was a misdemeanor (46 U.S.C., sec. 526m), and Davis could not be imprisoned therefor in a penitentiary without his consent (18 U.S.C., sec. 4083). Permissible allowances on the term of the sentence would reduce it to 5 months. 18 U.S.C., sec. 497.

On November 29, 1949, and responsive to application by Davis' attorney, the Director of Prisons telegraphed from Washington to John H. Roseen, acting United States Marshal at San Francisco, approving

service of this sentence in a local jail. RT 145. With a different attorney representing him, Davis prosecuted an appeal from the judgment of conviction. This court affirmed the judgment on December 11, 1950. *Davis v. United States*, 9 Cir., 185 F. 2d 938. The Supreme Court denied a petition for writ of certiorari on February 26, 1951. *Davis v. United States*, 340 U.S. 932, 71 S.Ct. 495. On March 7, 1951, Davis began serving his sentence in one of the Alameda County jails, namely, the Santa Rita prison farm, rehabilitation or correction center. RT 18. He was still serving it when this action was tried. RT 228.

Davis never met defendant Carrigan before the trial of this action. RT 342. They had no conversation or discussion respecting the Davis case or any of its phases. RT 234. Davis met defendant Calmes when the latter, as deputy marshal, arrested Davis on the charge of violating the Motor Boat Act of 1940. RT 228. They had met on an earlier occasion. RT 228. Davis again met Calmes when the latter bought an automobile from the Davis agency in 1949 or 1950. RT 229. Prior to January 27, 1951, they had conversed about the Davis case and the possible imprisonment facing Davis. RT 277. A continuing social and business friendship had existed between Davis and defendant Neider for 25 years. RT 234, 342. From the inception of the Davis case, Davis discussed all its phases with Neider and sought his advice and assistance. RT 1046-1060. Davis had met defendant Reynolds, this appellant, sometime after 1949, and

was "very, very slightly" acquainted with him. RT 349. They had no conversation or discussion respecting the Davis case or any of its phases until February of 1951. RT 237.

John Church (John L. Church, RT 19), named as a conspirator but not as a defendant, lived in Alameda County and became manager of the Davis automobile agency on March 1, 1949. RT 19. He had previously been assistant vice president of a bank and vice president of a finance company. RT 137. He had known Davis since 1932. RT 138. He became acquainted with defendant Carrigan on January 27, 1951, when defendant Calmes brought defendant Carrigan into the Davis agency as a prospective purchaser of an automobile. RT 24. Church became acquainted with Calmes in April of 1949. RT 19. He again met him in 1950 when Calmes bought an automobile from the Davis agency. RT 20. They discussed the imprisonment phase of the Davis case shortly before January 27, 1951. RT 22. Church became acquainted with defendant Neider when the latter bought an automobile from the Davis agency shortly after March 1, 1949. RT 29. Their first discussion of the imprisonment phase of the Davis case occurred on March 7, 1951. RT 29. Church did not become acquainted with defendant Reynolds, this appellant, until March 23, 1951, and they had no discussion of the imprisonment phase of the Davis case before that time. RT 42-43.

Defendant Edward J. Carrigan lived in San Francisco and was the United States Marshal at San Francisco. RT 707. He was appointed to that office by

the President on August 11, 1950. RT 797. He had no prior connection with the Marshal's office. RT 797. At one time he was postmaster of the City of San Mateo. RT 798. He became acquainted with his deputy, defendant Calmes, on taking office as Marshal. RT 798. He never saw defendant Neider or talked with him until after April 12, 1951. RT 1044-1045. Up to January 27, 1951, he had met defendant Reynolds on two occasions—once at a labor convention in Los Angeles in 1949, and once at a Jefferson-Jackson Day Dinner in San Francisco on April 9, 1950. RT 798-799, 1201-1202. Between January 27, 1951, and April 12, 1951, he did not see defendant Reynolds or talk to him. RT 881. In his candidacy for United States Marshal, defendant Carrigan was opposed by defendant Reynolds who supported a rival candidate. RT 882.

Defendant Ray Calmes (Raymond J. Calmes, RT 961) was a resident of Alameda County, and a deputy United States Marshal. RT 961. He had served in that capacity for 8 years and was assigned to east bay territory. RT 961. He had a civil service status. RT 455-456. He also operated a grocery store in Oakland. RT 1028. He did not become acquainted with defendant Neider or defendant Reynolds until after April 12, 1951. RT 997-998, 1045. He did not see defendant Neider or defendant Reynolds or talk with either of them between January 27, 1951, and April 12, 1951, or at any other time or times. RT 997-998, 1045.

Defendant Sam Neider (Samuel R. Neider, RT 1042) lived in San Francisco, and was a real estate

and investment operator in the bay area. RT 1042-1043. As stated, a continuing social and business friendship had existed between Davis and Neider for 25 years, and from the inception of his case Davis had sought the advice and assistance of Neider on every phase thereof. Neither had a speaking acquaintance with defendant Reynolds running over 15 years. RT 1201. In September or October of 1950, they became business associates in an Oakland business venture known as the Union Club. RT 1043-1044.

This appellant, defendant Jack Reynolds (Cecil Lee Davidson, RT 1194) lived in Alameda County. RT 1197. His true name was Cecil Lee Davidson. RT 1196. As a boxer, early in his career, he had adopted the name Jack Reynolds as more appropriate. RT 1197. The name Jack Reynolds persisted and appellant has used no other for over 30 years. RT 1196. He was business manager or agent of the Alameda County Building Trades Council whereof all construction unions were members. RT 1197-1199. His office is in the Labor Temple in Oakland. RT 1200. The nature of his work is that of public relations counsel. RT 1199. On behalf of labor, he was active in national, state, and local politics. RT 1202, 1215. Appellant also operated the Union Club across the street from the Labor Temple on premises leased from defendant Neider on a percentage basis. RT 1043-1044.

Appellant Reynolds' first contact with the Davis case was before that case went to trial. RT 1208. He was then asked by Neider if he could give advice or assistance to Davis, and appellant answered that he

could not. RT 1208-1209. Another contact with the Davis case occurred late in November of 1949. RT 1211. Davis had then been convicted and his case had reached the appeal stage. Neider asked appellant to recommend an attorney for Davis on appeal as Davis was dissatisfied with the attorney representing him. RT 1047-1049, 1211-1212. Appellant made such recommendation and Davis employed the attorney. RT 1049-1052, 1212-1213. Appellant's next contact with the Davis case was early in February of 1951. RT 1222-1223. The case had then reached the certiorari stage and was pending in the Supreme Court. Neider asked appellant if he thought it possible to arrange for Davis to serve his sentence in a local jail if he had to serve it. RT 1222-1223. Reasons favorable to Davis were discussed and appeared strong. RT 1059. A few days later appellant told Neider he thought it would be easy to make such arrangement, that the matter would have to be handled through Washington, and that the expense would be \$1000. RT 1231-1232. In the interval, appellant had conferred with Augustine F. Gaynor, a member of the Brotherhood of Railroad Clerks, and an experienced Legislative representative in appellant's opinion, and had reached an agreement whereby Gaynor was to go to Washington if and when notified by appellant and if and when expenses of \$1000 were paid with the objective of presenting a showing on behalf of Davis and obtaining the consent of the Bureau of Prisons to Davis serving his sentence in a local jail. RT 1226-1230, 1397-1405.

Appellant was not advised at any time of the telegram from the Director of Prisons on November 29, 1950, or that the Director had already given his approval to imprisonment of Davis in a local jail. RT 1213.

The tenor of the Neider-Reynolds conversation last mentioned was relayed by Neider to Davis and Davis approved it. RT 1061-1062. At least three conversations between Davis and appellant followed. It is certain from the record that none of the Davis-Reynolds conversations occurred later than March 16, 1951, but the evidence is conflicting as to the number and contents of the conversations.

Davis said the number was six. RT 237-245. Two he placed as having occurred over the telephone. One of these, he said, occurred early in February of 1951 and consisted in making an appointment to meet appellant Reynolds at the suggestion of Neider. RT 237. He said the other telephone conversation occurred on March 5, 1951, and that appellant then told him when and where to surrender. RT 242-243. Two conversations, similar in import, and two or three days apart, were placed by Davis as occurring at the Union Club in February of 1951. RT 237-240. At both these conversations, so Davis said, appellant said he was a very close friend of Marshal Carrigan, and for \$200 a month payable at the end of each month and for a total payment of \$1000, Davis would be placed in the jail at Fairfield (Solano County) with special privileges and it would be a wise move as the Marshal could

help or hurt him. RT 239. Davis said "he agreed to go along with the deal". RT 238. Davis also said that Neider was not present at either of these conversations. RT 406.

According to Davis, a Davis-Reynolds conversation also occurred at the Davis agency around the middle of February of 1951. RT 240. At that time, so he said, appellant Reynolds told him the Supreme Court was about to act unfavorably, prison was impending, the Marshal had changed his plans and Davis would be sent to Santa Rita instead of Fairfield as the Sheriff of Alameda County could do Davis a lot of good, that Davis would be required to surrender in a few days, and appellant Reynolds would tell him when to surrender. RT 240-242.

And the final Davis-Reynolds conversation according to Davis occurred at Santa Rita on March 16, 1951, and as related by Davis was as follows (RT 246):

"Mr. Reynolds came out to see me and said that Mr. Carrigan was very angry because he had received no money, and I told him I couldn't understand his anger because he was not supposed to receive any money at that point. And he said nevertheless he wanted some money and he wanted it quick, and that there was a train leaving for McNeil Island Penitentiary the following Wednesday, and if he didn't have the \$500 immediately, that I would be on it and Mr. Carrigan would pull the rug out from under me. * * * I told him I would let him know."

Appellant testified there were three Davis-Reynolds conversations—two at the Union Club and one at Santa Rita. RT 1204-1205. He was not permitted to testify as to the second conversation at the Union Club. RT 1235-1236. He said he never talked to Davis over the telephone. RT 1205. He said he was never at the Davis agency. RT 1295. And he said he talked to Davis alone at Santa Rita but that Neider was present on the other occasions. RT 1205, 1290.

The first Davis-Reynolds conversation, according to appellant Reynolds, occurred February 10, 1951, at the Union Club. RT 1232. He gave the substance of the conversation as follows (RT 1233-1235):

“Davis asked what appellant thought could be done about the local situation, and appellant replied he was confident it could be worked out. Davis asked if immediate action could be had, and appellant replied he could get busy within a couple of days and have an answer within a week. Davis said he would advise appellant, as he might be able to serve his imprisonment in the San Mateo County jail.”

Incidentally, Davis had been fully aware ever since November of 1949 that the Director of Prisons at Washington alone had authority to approve imprisonment in a local jail, and that such approval, presumably for the San Mateo County jail (San Bruno), had been sought by his attorneys and granted. RT 265-269.

As stated, appellant was not permitted to testify as to the second Davis-Reynolds conversation. RT 1235-1236.

On March 15, 1951, appellant told Neider he was going to southern California to attend a labor convention and he asked Neider to keep an eye on the Union Club in which they were mutually interested. The course of travel south passed by Santa Rita and Neider asked appellant to stop there and see Davis. RT 1243-1244. He did so, and the third Davis-Reynolds conversation occurred at Santa Rita on March 16, 1951. RT 1205, 1248. Appellant testified to the substance thereof as follows (RT 1249-1251):

“Davis said he was ‘scared to death’ as he had been told he was about to be moved to McNeil Island, and he asked appellant if he could ‘get busy on the matter they had discussed’ and see what he could do. Davis asked appellant to telephone Neider and ask him to see Davis right away, and appellant promised to do so.”

Neider testified that in February of 1951 he had a conversation with Davis extending over an hour at the Red Boot Cafe across the street from the Davis agency, and that following this conversation he accompanied Davis to the Union Club, introduced him to appellant, and was present at the conversation which ensued. RT 1062-1063. This conversation, as related by Neider, consisted of Davis asking appellant if everything was set and appellant replying in the

affirmative, and some discussion of the Davis appeal. RT 1064-1067.

As stated, the Supreme Court denied the Davis petition for certiorari on Monday, February 26, 1951. On the same day telegraphic notice of the denial was sent by the clerk of the Supreme Court to the attorney representing Davis. RT 1112-1113. Davis was in Detroit attending a convention of automobile dealers on February 26 and 27, 1951. RT 1070. On receipt of the telegraphic notice an associate of Davis' attorney communicated by telephone with the clerk of this court and was advised that in the ordinary course the mandate of the Supreme Court would reach San Francisco somewhere around March 5, 1951, and, in turn, that the mandate of this court would immediately go down to the District Court at Sacramento where an order would be issued to take Davis into custody. RT 1114. Before March 5, 1951, such attorney told Davis and Church of the action of the Supreme Court and the impending surrender of Davis. RT 1114. First by telephone and then in person this attorney communicated with the office of the United States Marshal and discussed the time and place of surrender by Davis and place of imprisonment. RT 1114-1115.

On March 5, 1951, and after telephoning Neider, Davis went to Neider's hotel apartment in San Francisco, rented an adjoining apartment, and remained there until he left there for Oakland to surrender on March 7, 1951. RT 1070. The arrangements for the surrender of Davis on March 7, 1951, and for the time

and place of such surrender, were made by Miss Anderson, the calendar clerk in the office of Davis' attorney. RT 1103-1107. After unsuccessfully trying to locate Davis at his home and at his place of business in Oakland Miss Anderson telephoned this appellant, on whose recommendation Davis had employed such attorney, seeking information as to the whereabouts of Davis. RT 1105. Appellant referred her to Neider as the best source of information. RT 1105. Miss Anderson thereupon telephoned Neider on March 6, 1951, and Neider informed her that Davis was with him. RT 1105-1106. After consulting with Davis (RT 1071-1072), Neider named a time and place for such surrender on March 7, 1951, and Miss Anderson relayed the information to the Marshal's office and obtained approval. RT 1106-1107. Davis surrendered on March 7, 1951, at the time and place thus arranged and approved.

The visit of appellant to Davis at Santa Rita on March 16, 1951, has already been mentioned. After talking to Davis, appellant communicated with Neider and told him Davis wanted to see him. Neider visited Davis at Santa Rita on March 18, 1951. RT 1074, 1077. He had not seen Davis since March 7, 1951. RT 1074. At their conversation on March 18, 1951, Davis told Neider he had heard at Santa Rita he was about to be moved to another jail, and asked Neider to see appellant and have him go through with the arrangements for a local jail through Washington. RT 1079. Neider mentioned the expense of \$1000 and

Davis suggested a present payment of \$500 with another payment of \$500 when Santa Rita or some other local jail was made certain. RT 1079. Neider promised to do so when appellant returned from the south. RT 1080.

On March 19, 1951, Church, the manager of the Davis agency, telephoned Neider and said Davis had instructed him to give \$500 to appellant Reynolds. RT 1081. Neider told him to leave the \$500 for appellant in an envelope at the Union Club. RT 1081. It was there when appellant returned from the south, and on March 20, 1951, he telephoned Neider asking why the envelope contained only \$500 instead of \$1000. RT 1181, 1256. Neider explained the contingency proposed by Davis, and appellant stated he thought it would be impossible to work it out on that basis, but said he would try. RT 1181-1182, 1256-1257. Appellant conferred with Gaynor on March 20, 1951, and tried to get him to go to Washington on the contingency basis but Gaynor refused and insisted he be paid \$1000 before he would leave for Washington. RT 1257-1260, 1406-1409.

The reaction of appellant to the contingency basis proposed by Davis had been communicated by Neider to Church as early as March 20, 1951. RT 1182-1183. Neider then made an appointment for Church to meet appellant, and the meeting occurred on March 23 or 24, 1951, with Neider, Church, and appellant present. RT 1182-1183. This was the first time that Church had ever met appellant. RT 43. The evidence is conflicting as to what was said at the meeting.

As Church has the conversation of March 23 or 24, appellant said that Marshal Carrigan wanted another \$500 and he had "enough on the guy" so there would be no further demands, and when Neider asked appellant to try and make a deal, appellant offered to return to Church the \$500 he had received, and Church said he had no authority to receive it and would see Davis. RT 42, 47-48, 193-194.

As Neider has the conversation, the proposed contingency arrangement of \$500 down and \$500 later was discussed, and appellant said, "I saw the man and he won't go for less than \$1000", to which Church said he had no authority to pay more than \$500, and when Neider suggested that appellant again try to make a deal, appellant said, "You might as well take this \$500 back because I can't do anything with it", whereupon Church refused to accept the \$500 and said he would talk to Davis. RT 1091-1092.

And as appellant has the conversation, he said, in answer to a question by Neider, "I don't know any more that can be done", and when Neider asked appellant to try again, appellant replied he did not think he could get anyone to go to Washington for \$500 as that sum would not even cover expenses, whereupon appellant started to hand to Church the \$500 he had received, saying he had no intention of trying to do anything further in the matter, and Church asked appellant to wait until he talked to Davis and that he would telephone appellant the following Monday. RT 1262-1270.

Following the conversation of March 23 or 24, Church talked to Davis. RT 49. On March 26, 1951, a conversation, preceded by an appointment over the telephone, occurred between Church and appellant at the office of appellant in the Labor Temple, no other persons being present. RT 49-50.

Church related the conversation of March 26, 1951, as follows: He asked appellant for the \$500 and appellant handed it to him, and Church then said to appellant that Davis had told him to tell appellant (1) to get the \$500 back, (2) that if any attempt was made to move Davis the proper authorities would be (or had been) informed, and (3) that a wire would be sent to the Director of Prisons, and appellant then said, "The orders for Mr. Davis' removal were issued yesterday", or "The papers were already made out yesterday". RT 50-51, 203-209.

Appellant related the conversation of March 26, 1951, as follows: Church said, "Well, you haven't been able to do anything more on that matter", and appellant said "no", Church said, "I will take the money", and appellant handed it to him, and as Church was leaving he said, "Phil Davis and I are tired of being pushed around in this matter—if there is any attempt to move Phil Davis or any further trouble caused in this matter, the case has been taken to the FBI and I will take it to Hoover if necessary and if there is any attempt to move him the Marshal will be put in the penitentiary and you can tell him so", to which appellant replied, "If you have any

messages for the Marshal or anything to say to the Marshal do it yourself, because I haven't any dealing with the Marshal''. RT 1269-1273.

With the exception of a brief conversation over the telephone between Church and appellant on March 27 or 28, 1951, in which, according to Church, appellant again repeated that he was "all through" (RT 56), there is no evidence in the record that after March 26, 1951, appellant had any contact with the Davis case or any phase thereof.

After leaving appellant's office on March 26, 1951, Church consulted an attorney and the District Attorney of Alameda County, the Sheriff of Alameda County, and the FBI were called in. RT 170. From then on all actions of Davis and Church were directed and supervised by the FBI. From then on the record is concerned with the actions of defendants Carrigan and Calmes under the surveillance of the FBI. The culmination was on April 12, 1951, when Church handed defendant Carrigan the sum of \$2000 near 7th and Mission Streets in San Francisco and the FBI apprehended defendant Carrigan with the \$2000 in his possession.

SPECIFICATION OF ERRORS RELIED UPON.

1. The court erred in denying appellant's motion for judgment of acquittal.
2. The court erred in instructing the jury as follows:

“Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.” RT 1484/18-22.

* * * * *

“Mr. Burns: The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, ‘Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.’ It is my understanding of the law that there has to be concerted action in a conspiracy, and as I indicated before there could be co-existent two separate conspiracies. * * *

“Mr. Gillen: I join in the objection regarding 13, may it please the Court, and the further objection that because of the nature of the evidence here I believe that 13 is also confusing, particularly for the defendant Reynolds, for the reason that Reynolds—the object of the conspiracy might be mistaken. In other words, the defendant Reynolds’ object to by a lawful means assist in placing or having Phil Davis retained in a certain place might be misconstrued and confused with the mere object of trying to assist lawfully and for a legitimate purpose. * * * Eleven attempted to cover it, but I don’t feel that went far enough.” RT 1499/22 to 1501/9.

3. The court erred in instructing the jury as follows:

“Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, you would be justified in the conclusion that such persons were engaged in a conspiracy.” RT 1484/3-12.

* * * * *

“Mr. Gillen: Eleven attempted to clear it, but I don’t feel that went far enough. The same situation, in my humble opinion, exists so far as the defendant Reynolds in Instruction 11, that the purpose or object might be misunderstood.” RT 1501/8-12.

4. The court erred in instructing the jury as follows:

“An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street or driving an automobile, or using a telephone. But, if, during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act.” RT 1489/8-12.

* * * * *

“Mr. Gillen:* * * And also in Instruction No. 23, may it please the Court, which refers to innocent acts which might be overt acts, innocent and innocuous in themselves, for the same reason might be misconstrued as to what is an unlawful object or what is a lawful object.” RT 1501/8-17.

5. The court erred in denying appellant’s motion for a new trial.

SUMMARY OF ARGUMENT.

Appellant’s paramount contention on the appeal is that the judgment against him should be reversed for the reason that it is not supported by substantial evidence. The contention has two aspects. The first aspect is that the general conspiracy alleged in the indictment was not proved. The second aspect is that a separate conspiracy was not proved against appellant.

Appellant also contends that if it be assumed he was convicted of the general conspiracy by evidence proving several conspiracies a reversal of the judgment must also follow for the reason that he suffered substantial prejudice thereby. (*Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L. Ed. 1557; *Canella v. United States*, 9 Cir. 157 F.2d 470.)

A further reason for reversal of the judgment is that erroneous instructions operated to the prejudice of appellant.

Under the circumstances of the case the denial of appellant’s motion for a new trial reflects a manifest abuse of discretion.

ARGUMENT.

1. **THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**
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Specification of Error No. 1. The court erred in denying appellant's motion for judgment of acquittal.

Specification of Error No. 5. The court erred in denying appellant's motion for a new trial.

The indictment charged appellant with being a member of a conspiracy that began January 27, 1951, and ended April 12, 1951. CT 1. And those alleged as conspirators were Phil Davis, John Church, defendant Edward J. Carrigan, defendant Ray Calmes, defendant Sam Neider, and defendant Jack Reynolds (this appellant). CT 1.

The record before the court makes it plain that both ends of the alleged conspiracy chain extended much further than any evidence connecting appellant with the imprisonment phase of the Davis case.

The indictment alleges January 27, 1951, as the beginning of the alleged conspiracy. CT 1. And the first overt act alleged in the indictment is that "On January 27, 1951, said defendant Edward J. Carrigan met said John Church at the Phil Davis Automobile Agency, 2547 E. 14th St., Oakland, California, and they held a conversation together". CT 4.

The episode of January 27, 1951, was the subject of a great deal of conflicting testimony at the trial,

and it had reference to what was said and done on that date when defendant Calmes brought defendant Carrigan into the Davis agency as the prospective purchaser of an automobile. From the testimony of Church it may be inferred that defendant Carrigan unsuccessfully sought to use the veiled threat of his position and influence as United States Marshal to extract from Davis a new automobile for an old one. RT 24-27.

There is no semblance of evidence in the record showing or tending to show that appellant had any connection with the episode of January 27, 1951. To the contrary, the record conclusively shows that appellant's first contact with the imprisonment phase of the Davis case occurred early in February of 1951 at the friendly intercession on behalf of Davis by defendant Neider, a friend and business associate of appellant. On the record, moreover, it conclusively appears that if any conspiracy was formed prior to January 27, 1951, or was formed or existed on that date, it was confined to defendants Carrigan and Calmes, and that neither Davis nor Church nor Neider was party to any conspiracy when, early in February of 1951, appellant's first contact with the imprisonment phase of the Davis case occurred through the friendly intercession of Neider.

The indictment alleges April 12, 1951, as the ending of the alleged conspiracy. CT 1. And the fourth and fifth overt acts alleged in the indictment are that "4. On April 11, 1951, said John Church had a conversa-

tion with said defendant Ray Calmes at said Phil Davis' Automobile Agency", and that "5. On April 12, 1951, on Mission Street between Sixth and Seventh Streets, in the City and County of San Francisco, State of California, about 2:13 o'clock in the afternoon of said day, said defendant Edward J. Carrigan had a conversation with said John Church, and said John Church delivered to the said Edward J. Carrigan the sum of \$2000.00 in United States currency, and said Edward J. Carrigan accepted the same". CT 3.

The record is plain, however, as pointed out in the statement of the case herein, that on March 26, 1951, Church told appellant that the FBI had been called in or was about to be called in, and that on that day all connection of appellant with the imprisonment phase of the Davis case was terminated. This termination on March 26, 1951, was confirmed by the testimony of Church (RT 46-50, 156, 162, 178-179, 224), by the testimony of Neider (RT 1187-1189), and by the testimony of appellant (RT 1270-1273). There was no testimony to the contrary.

The FBI was in fact called in by Davis and Church on March 26, 1951. RT 170, 250-251. From then on, the activities of Davis and Church were directed and supervised by the FBI. Therefore, in no sense can it be said that they were *parties* to any conspiracy after March 26, 1951. Nor can it be said that either defendant Neider or appellant was party to any conspiracy after March 26, 1951. Whatever their activi-

ties may have been such activities were on the side of Davis and at his instance and on his behalf, and according to the record all those activities terminated at his request on March 26, 1951. The truth of this as to defendant Neider was recognized by the trial court, for it granted his motion for judgment of acquittal. RT 735-742. It was equally true as to appellant but the trial court failed to recognize its truth, for it denied his motion for judgment of acquittal. RT 735-742.

Other evidence in the record may be referred to as demonstrating that appellant's activities in connection with the imprisonment phase of the Davis case terminated on March 26, 1951. The fact of this termination was tested by the FBI as soon as it was called into the Davis case and assumed the direction and supervision of Davis and Church. Neider testified that he received a telephone message from Church *subsequent to March 26, 1951*, saying that Davis was very worried and wanted to know if Neider could get Reynolds to do something and asked Neider to telephone Reynolds. RT 1189. As to what then occurred Neider testified as follows: "So I called Phil—I mean Reynolds, and I said Church has called me and that Davis was very worried and asked him if he wanted—if there was anything he could do regarding the case, and he said, 'I have washed my hands of the case entirely.' He said, 'I don't want anything to do with Davis or Church either.' And that was

all. So I hung up and called Church immediately back and told him this was the situation and he said, 'Well, what shall I do? Can you do anything?' I said, 'I have no thought on the matter.' And he said, 'Well, what should I do?' And I said, 'Well, I just don't know.' " RT 1189.

And *subsequent to March 26, 1951*, a telephone message was left at appellant's office to the effect that "the man at Santa Rita wants to get in touch with you immediately", and appellant thereupon telephoned Church. RT 1207. As narrated by Church the telephone conversation at that time was as follows: "He told me that his secretary had a call from Santa Rita. He said I was the only one he could think of who might have any connection with Santa Rita, and he asked me if I had been trying to get in touch with him. I said, no, I had not. * * * I told him Mr. Davis was very much upset, angered, and thought he was being very badly abused by all of them. He said, 'As far as I am concerned, I am all through'." RT 55-56.

It is therefore apparent without further argument that the general conspiracy charged in the indictment was not proved against this appellant. As earlier stated, both ends of the alleged conspiracy chain extend much further than any evidence connecting appellant with the imprisonment phase of the Davis case.

There remains for consideration, of course, the question whether a separate conspiracy was proved against appellant. The record contains no evidence that appellant ever talked to or communicated with defendant Carrigan or defendant Calmes about the Davis case at any time. The entire case against appellant rests entirely on admissions or declarations ascribed to appellant by Davis and Church, alleged co-conspirators, in conversations they had with him commencing early in February of 1951 and ending on March 26, 1951. The case, therefore, is peculiarly one for an application of the general rule that in conspiracy cases the corpus delicti cannot be proved by the admissions or declarations of a defendant. *Colt v. United States*, 5 Cir. 160 F. 2d 650, 651; *Tabor v. United States*, 4 Cir. 152 F. 2d 254, 257; *United States v. Di Orio*, 3 Cir. 150 F. 2d 938, 940; *Ryan v. United States*, 8 Cir. 99 F. 2d 864, 869.

Fairly summarized, the testimony of Davis was that on or about February 10, 1951, appellant said he was a good friend of Marshal Carrigan and that for \$200 a month Davis would be placed in the Solano County jail (Fairfield) with special privileges and it would be a wise move for Davis as the Marshal could help or hurt him, and Davis said he would "go along" with the deal; that later in February appellant said the Marshal had changed the plans and Davis would be sent to Santa Rita instead of Fairfield; that on March 5, 1951, appellant told Davis

when and where to surrender; and that on March 16, 1951, appellant told Davis the Marshal was angry because he had received no money and Davis would be sent to the McNeil Island penitentiary the following Wednesday (March 21) if \$500 was not paid immediately. And fairly summarized, the testimony of Church was that on March 23 or 24, 1951, appellant offered to return to Church the \$500 he had received and said the Marshal wanted another \$500, and he had "enough on the guy" so there would be no further demands; and that on March 26, 1951, appellant returned the \$500 to Church, and when Church told appellant the matter had been placed or would be placed in the hands of the FBI appellant said an order for the removal of Davis had been issued the day before (March 25).

Before these conversations are discussed some of their background must be developed. The record is undisputed that early in February of 1951 Neider made the initial contact with appellant respecting the imprisonment phase of the Davis case. Both Neider and appellant testified that their discussions and conversations always had reference to a plan whereby a representative was to go to Washington on behalf of Davis, at an expense of \$1000, and there present to the Director of Prisons in person a proper application and showing and obtain from the Director of Prisons authorization for imprisonment of Davis in a local jail. There was nothing unlawful in this. It

is common and proper practice and procedure according to the testimony of the Director of Prisons. RT 731, 733. As a matter of fact such authorization had been obtained from the Director of Prisons as early as November 30, 1949. Although Davis was fully aware of this he never communicated the fact to Neider or appellant at any time. When this authorization was received by the local office of the United States Marshal it was placed in the files by John Roseen, the chief deputy and then acting United States Marshal, and he did not call it to the attention of Marshal Carrigan, who was appointed in August of 1950, until March 5, 1951. RT 489-490. This authorization was never revoked. RT 456. It required the consent of the local United States Attorney, and that was not obtained until March 5, 1951. RT 450. Without such authorization from the Director of Prisons and such consent by the local United States Attorney, Davis could not have been committed to a local jail. RT 463-464. Once there, he could not be transferred to McNeil Island without specific authorization from the Director of Prisons. RT 515.

The Alameda County jail was an accredited jail for Federal misdemeanor prisoners. RT 464. And Alameda County was where Davis and his family lived and where his business was located. In normal course a Federal misdemeanor prisoner committed to the Alameda County jail would be placed by the Sheriff of that county in the branch at Santa Rita.

RT 660. The Sheriff of Alameda County did not tolerate special privileges for such prisoners. RT 654-655. Appellant was told this by the Sheriff before Davis was committed to the Alameda County jail. RT 654-655. There was nothing unlawful in thus committing Davis. The time and place for the surrender of Davis was arranged with the Marshal's office by the office of the attorney representing Davis in the certiorari proceeding and imprisonment for Davis in a local jail discussed. RT 1104-1107, 1113-1114. This was after the office of such attorney had told Davis and Church that the petition for certiorari had been denied and Davis would have to surrender. RT 1114.

When appellant visited Davis at Santa Rita on March 16, 1951, appellant was on his way south to a labor convention. Davis was aware of this. RT 427. Appellant did not return to Oakland until March 19, 1951, and the \$500 which Church had left for him in his absence did not come into appellant's possession until late that afternoon. RT 1253-1255. The record shows that Marshal Carrigan left San Francisco for the east at 8:40 a.m. of March 19, 1951, and did not return to San Francisco until after Wednesday, March 21, 1951. RT 495-496. Between March 19, 1951, and March 21, 1951, appellant told Neider that \$500 was not enough and that \$1000 would be necessary, and confirmed the inadequacy by talking to the representative it was proposed to send to Washington on behalf of Davis. RT 1253-1257. Defendant Calmes left for Honolulu on March 24, 1951,

and did not return to San Francisco until April 4, 1951. RT 973. There was no attempt to move Davis from Santa Rita to another jail until after March 26, 1951, and until after Church had told appellant the FBI had been called in or would be called in in the Davis case.

The background above developed utterly destroys any contention the appellee might make that the corpus delicti was established by independent proof corroborating the admissions or declarations ascribed to appellant by Davis and Church.

In essence, the case against appellant from the Davis-Reynolds and Church-Reynolds conversations is that early in February of 1951 Davis and Church conspired with appellant to pay the United States Marshal, through appellant, the sum of \$200 at the end of each month for imprisonment of Davis in the Fairfield jail with special privileges, that later in February of 1951 the Santa Rita jail was substituted for the Fairfield jail by the Marshal, that around March 16, 1951, the Marshal, through appellant, demanded from Davis the immediate payment of \$500 or Davis would be sent to McNeil Island on March 21, 1951, that on March 19, 1951, Davis, through Church, paid this \$500 to appellant for the Marshal, that between March 19 and March 22, 1951, the Marshal, through appellant, demanded another \$500 from Davis, that on March 23 or 24, 1951, Davis, through Church, refused to pay another \$500, and

that on March 26, 1951, appellant returned the original \$500 to Church.

It appears from the record, however, that special privileges, if any, in local jails would come from the Sheriff having custody of a Federal misdemeanor prisoner and not from the United States Marshal; that authorization from the Director of Prisons, Washington, was required before such prisoner could be imprisoned in a local jail; that up to March 5, 1951, neither the Marshal nor appellant was aware that such authorization had been given in the Davis case; that the traveling schedules of the Marshal and appellant precluded their meeting between March 16, 1951, and March 22, 1951; that before March 21, 1951, appellant had told Neider that the \$500 left by Church at appellant's place of business during his absence, on March 19, 1951, was inadequate for the expenses of the proposed representative to Washington; that the original \$500 was returned by appellant to Church on March 26, 1951, and appellant's connection with the imprisonment phase of the Davis case terminated; and that all efforts of the Marshal to move Davis to another jail occurred after March 26, 1951.

Thus it is apparent that the independent evidence not only fails to corroborate the admissions and declarations ascribed to appellant by Davis and Church, but it has the effect of discrediting or nullifying their testimony that such admissions and declarations were made by appellant. Manifestly, a separate conspiracy was not proved against appellant.

On the record, then, the judgment against appellant should be reversed for the reason that it is not supported by substantial evidence. The insufficiency of the evidence was challenged by appellant's motion for judgment of acquittal and by his motion for new trial. It is plain error available to him on appeal regardless of challenge or want of challenge in the trial court. *Lockhart v. United States*, 4 Cir. 183 F. 2d 265, 266; *United States v. Norton*, 2 Cir. 179 F. 2d 527, 528; *United States v. Renee Ice Cream Co.*, 3 Cir. 160 F. 2d 353, 355; Rule 52 (b), Federal Rules of Criminal Procedure.

If it be assumed, however, that appellant was convicted of the general conspiracy by evidence proving several conspiracies a reversal of the judgment must also follow for the reason that appellant suffered substantial prejudice thereby. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557; *Canella v. United States*, 9 Cir. 157 F. 2d 470.

Earlier evaluation of the evidence has demonstrated that both ends of the alleged conspiracy chain extended much further than any evidence connecting appellant with the imprisonment phase of the Davis case. From the state of the record these inevitable conclusions are prompted: *First*, if a conspiracy was formed or existed on or prior to January 27, 1951, it was formed by defendants Carrigan and Calmes with the objective of extracting from Davis a new automobile for defendant Carrigan's old one, and it ended in frustration on January 27, 1951, without

having been joined by any of the others named in the indictment as conspirators; *second*, if a conspiracy existed after January 27, 1951, it was formed by those named in the indictment as conspirators other than defendants Carrigan and Calmes with the objective of paying money to defendant Carrigan or some other person or persons in return for placing Davis and keeping him placed in a local jail and it ended in frustration on March 26, 1951; *third*, if any conspiracy existed after March 26, 1951, to pay defendant Carrigan \$2000, it was formed at the instance of Davis and Church acting under the direction and supervision of the FBI and it included defendants Carrigan and Calmes but did not include defendants Neider and Reynolds and it ended on April 12, 1951, with the payment of \$2000 to defendant Carrigan under the direction and supervision of the FBI.

Viewed in the foregoing light the case against appellant would unquestionably call for an application of the principles announced and applied by the Supreme Court in the Kotteakos case and followed and applied by this court in the Canella case on the authority of the Kotteakos case. This case would fall squarely within the principles of those cases, for it would be obvious that appellant was convicted of the general conspiracy by evidence proving several conspiracies and there was a fatal and prejudicial variance between the allegations of the indictment and the proof. Those cases would demand a reversal of the judgment of conviction against appellant in this case.

In closing the branch of the argument challenging the sufficiency of the evidence appellant respectfully urges that from whatever aspect the evidence may be viewed his conviction reflects a miscarriage of justice and the judgment against him should therefore be reversed.

2. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT ERRONEOUS INSTRUCTIONS OPERATED TO HIS PREJUDICE.

Specification of Error No. 2. The court erred in instructing the jury as follows:

“Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.” RT 1484/18-22.

“Mr. Burns: The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, ‘Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.’ It is my understanding of the law that there has to be concerted action in a conspiracy, and as I indicated before there could be co-existent two separate conspiracies. * * *

“Mr. Gillen: I join in the objection regarding 13, may it please the Court, and the further objection that because of the nature of the evidence here I believe that 13 is also confusing, particularly for the defendant Reynolds, for the reason that Reynolds—the object of the conspiracy might be mistaken. In other words, the defendant Reynolds’ object to by a lawful means assist in placing or having Phil Davis retained in a certain place might be misconstrued and confused with the mere object of trying to assist lawfully and for a legitimate purpose. * * * Eleven attempted to cover it, but I don’t feel that went far enough.” RT 1499/22 to 1501/9.

Specification of Error No. 3. The court erred in instructing the jury as follows:

“Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, you should be justified in the conclusion that such persons were engaged in a conspiracy.” RT 1484/3-12.

“Mr. Gillen: Eleven attempted to clear it, but I don’t feel that went far enough. The same situation, in my humble opinion, exists so far as the defendant Reynolds in Instruction 11, that the purpose or object might be misunderstood.” RT 1501/8-12.

Specification of error No. 4. The court erred in instructing the jury as follows:

“An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street or driving an automobile, or using a telephone. But, if, during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act.” RT 1489/8-12.

“Mr. Gillen: * * * And also in Instruction No. 23, may it please the Court, which refers to innocent acts which might be overt acts, innocent and innocuous in themselves, for the same reason might be misconstrued as to what is an unlawful object or what is a lawful object.” RT 1501/8-17.

There was evidence before the jury in this case from which it could competently find that appellant's connection with the imprisonment phase of the Davis case covered a period much shorter than the indictment alleged and that during such period he lawfully pursued by lawful means the objective of having Davis imprisoned in a local jail and retained there. Yet under the instructions above challenged the jury was authorized to convict appellant of the general con-

spiracy although his own acts were innocent and lawful, if during such period others were unlawfully pursuing the same objective by unlawful means. Moreover, the challenged instructions authorized the jury to convict appellant of the general conspiracy on evidence of the overt acts of others occurring at any time during the period alleged in the indictment.

And if it be assumed that on the evidence before it the jury could competently find that there were several conspiracies instead of the one general conspiracy alleged, then the challenged instructions authorized the jury to convict appellant of the general conspiracy on evidence proving the several conspiracies and to impute to him the acts and statements of others in furtherance of a separate conspiracy wherein appellant was in no way involved.

It is enough to again invoke the Kotteakos case and the Canella case to demonstrate that the challenged instructions operated to the prejudice of appellant and require a reversal of the judgment.

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3. **THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT DENIAL OF HIS MOTION FOR NEW TRIAL WAS A MANIFEST ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT.**
-

Specification of Error No. 5. The court erred in denying appellant's motion for a new trial.

Appellant moved for a new trial on grounds asserting the insufficiency of the evidence and error in the jury instructions. RT 154-156. The motion was denied and judgment and commitment followed. RT 168-169.

From arguments that have preceded it is obvious that the motion for new trial should have been granted, and that its denial reflects a manifest abuse of discretion requiring a reversal of the judgment.

CONCLUSION.

Appellant therefore respectfully submits that the judgment against him should be reversed.

Dated, San Francisco,
February 11, 1952.

LESLIE C. GILLEN,
CLIFTON HILDEBRAND,
Attorneys for Appellant.

No. 13,118

IN THE

United States Court of Appeals
For the Ninth Circuit

EDWARD J. CARRIGAN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JAMES E. BURNS,

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FILED

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PAUL P. O'BRIEN
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No. 13,118

IN THE

**United States Court of Appeals
For the Ninth Circuit**

EDWARD J. CARRIGAN,

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UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

The indictment filed in the United States District Court for the Northern District of California, Southern Division, charged appellant and others with the crime of conspiracy (18 U.S.C., sec. 371) in that district. CT 1-3. The District Court had jurisdiction. 18 U.S.C., sec. 3231; Rule 18, Federal Rules of Criminal Procedure. After conviction appellant was sentenced to imprisonment and fine by final judgment of that court on August 23, 1951. CT 166-167. His notice of appeal to this court was filed August 23, 1951. CT 172. The appeal was timely. Rule 37 (a), Federal Rules of Criminal Procedure. The jurisdiction of this court to review the final judgment of the District Court is sustained by 28 U.S.C., secs. 1291, 1294.

STATEMENT OF THE CASE.

The indictment was filed April 18, 1951 (CT 3), and it charged that "on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951", the defendants Edward J. Carrigan, Ray Calmes, Sam Neider, and Jack Reynolds conspired together and with Phil Davis and John Church to defraud the United States in the exercise of its governmental functions by unlawfully attempting to influence, obstruct, and impede the Attorney General and the Bureau of Prisons in the designation of the places of confinement and transfer where Phil Davis, a Federal prisoner convicted of violating the Motor Boat Act was to serve his sentence of six months imprisonment. CT 1-2. Appellant was specifically named in two of the five overt acts alleged (CT 2-3) as follows:

"1. On January 27, 1951, said defendant Edward J. Carrigan met said John Church at the Phil Davis Automobile Agency, 2547 E. 14th St., Oakland, California, and they held a conversation together." CT 1.

"5. On April 12, 1951, on Mission Street between Sixth and Seventh Streets, in the City and County of San Francisco, State of California, about 2:13 o'clock in the afternoon of said day, said defendant Edward J. Carrigan had a conversation with said John Church, and said John Church delivered to the said Edward J. Carrigan the sum of \$2000.00 in United States currency, and said Edward J. Carrigan accepted the same." CT 3.

A judgment of acquittal was entered by the court on July 30, 1951. CT 12-13. This appellant and the defendants Calmes and Reynolds were found guilty by the jury on August 4, 1951. CT 151. Appellant's motion for a new trial (CT 152-153) in which he attacked the sufficiency of the evidence and the soundness of the jury instructions was denied August 23, 1951 (CT 162), and by judgment and commitment he was sentenced to imprisonment for 5 years and fined \$5000. CT 166-167. His notice of appeal was filed August 23, 1951. CT 172.

The record on appeal is typewritten and contained in 11 volumes. The first volume contains the clerk's transcript. (CT 1-178.) The other ten volumes contain the reporter's transcript. (RT 1-1511A.) In making this statement of the case appellant is mindful that much of the testimony of John Church, an alleged conspirator and the first government witness (RT 19), as to statements allegedly made to him by some of the defendants, came into the record under rulings of the court excluding it from the case against this appellant. And appellant is also mindful that the ruling of the court granting the motion of defendant Neider for judgment of acquittal was accompanied by a further ruling wherein he instructed the jury as follows (RT 741-742):

“During the course of the case, and particularly in the testimony of the two witnesses John Church and Phil Davis, and during the taking of the testimony of those witnesses, evidence was received that certain declarations were stated to

have been made by the defendant Neider. Since I have ruled that the evidence is insufficient as a matter of law to connect Neider as a member of the alleged conspiracy, I now charge you and instruct you that regardless of whatever ruling I have heretofore made of and concerning such declarations of Neider, such declarations are not evidence against the defendants Reynolds, Carrigan and Calmes or either of them, and you must disregard entirely such declarations in toto in considering the guilt or innocence of Reynolds, Carrigan or Calmes or either or any of them."

During the times referred to in the indictment appellant was the United States Marshal for the Northern District of California. The President appointed him to that office on August 11, 1950. RT 797. He was not connected with the Marshal's office before the appointment and was not experienced in the type of work entailed. John A. Roseen, with 24 years experience, was the Acting United States Marshal when appellant took office, and Roseen became Chief Deputy Marshal under appellant. RT 444-445.

Defendant Calmes was a Deputy United States Marshal when appellant took office. He had had 8 years experience and was a full time deputy handling the work of the office in Alameda County and the east bay area where he resided. RT 491, 961-962. Appellant was not acquainted with Calmes before August 11, 1950. RT 798. Calmes introduced appellant to John Church at the Phil Davis automobile agency in Oakland on January 27, 1951. RT 800, 803, 965-966. Ap-

pellant did not again meet Church or talk with him until April 12, 1951. RT 79, 91, 809, 930-931. Appellant was not acquainted with Phil Davis before taking office. RT 802. He did not see Davis or talk to him afterwards at any time before the trial of this action. RT 250, 809. The same statement is true as to defendant Neider. RT 1044-1045. Before taking office appellant had little acquaintance with and less liking for defendant Reynolds. He met Reynolds at a labor convention in 1948 or 1949 and at a political dinner on April 9, 1950. RT 879-880, 1201-1202. When appellant was campaigning for appointment as United States Marshal, Reynolds opposed his candidacy and supported a rival. RT 882-883, 893-894, 1202-1204. After April 9, 1950, appellant did not again see Reynolds or talk to him until the trial of this action. RT 799, 816, 881, 1277-1278, 1287.

Appellant went to the Phil Davis automobile agency in Oakland on January 27, 1951, pursuant to the suggestion and appointment of defendant Calmes. RT 998. It was preceded by an office conversation wherein appellant had stated his intention to replace his 1947 Pontiac automobile with a 1950 model automobile and Calmes had suggested that the Davis agency, where he bought an automobile in June of 1950 and where it was being serviced, had a number of 1950 Chryslers on hand. RT 963-964, 990, 999-1000, 1035-1037. Church and appellant had a conversation in the presence of other people and consuming less than half an hour at the Davis agency on January 27, 1951. RT 88-90, 809. The testimony is conflicting, however, as to what

was said at that time and place. As Church narrates the conversation appellant wanted to exchange his 1947 Pontiac automobile, valued at \$1150 to \$1500, for a 1950 Chrysler, priced at \$3025, saying in the course of the conversation, "Well, does Mr. Davis expect to make a profit on the deal?" (or "Mr. Davis doesn't expect to make same profit on a 1950 as on a 1951"), I guess Mr. Davis understands that after he is arrested I will have full charge over his custody", "I think Phil Davis ought to make a straight across the board deal, trade car for car", "After all \$1500 or \$2000 doesn't mean anything to Mr. Davis", and Church saying he would pass it on to Davis. RT 24-27, 88. As appellant narrated the conversation an even trade of automobiles was never mentioned or discussed, but when Church proposed a trade in value for appellant's Pontiac much less than he had been offered elsewhere, appellant pointed out that a new car would lose \$750 in value as soon as it was taken out of the shop, called the Davis agency "burglars without guns", and walked out of the agency with Calmes. RT 804-809, 868-869. He bought an automobile elsewhere. RT 869-870.

As of January 27, 1951, Davis was out on bail after having been convicted in the United States District Court, at Sacramento, of the misdemeanor offense of violating the Motor Boat Act, 46 U.S.C., sec. 526. He was sentenced to 6 months imprisonment. This court affirmed the judgment on December 11, 1950. *Davis v. United States*, 9 Cir. 185 F. 2d 938. The Supreme Court denied a petition for certiorari

on February 26, 1951. *Davis v. United States*, 340 U.S. 932, 71 S.Ct. 495. In due course an order to take Davis into custody was issued by the District Court, at Sacramento, and reached the Marshal's office in San Francisco on March 5, 1951. RT 480.

Ordinarily, a Federal misdemeanor prisoner sentenced to 6 months imprisonment is imprisoned in the prison camp at McNeil Island. RT 461-462, 733. Discretion to authorize imprisonment in a local jail in such cases is vested exclusively in the Director of Prisons in Washington. RT 463, 476-477, 514, 717-718, 733. Requests for such authorization are frequent and very often informal. RT 731-733. Family and business ties of the prisoner are important elements prompting the granting of such requests. RT 732. When authorization for imprisonment in a local jail is granted by the Director of Prisons, a United States Marshal has some latitude in designating the local jail. RT 476. The Alameda County jail is an accredited local jail for the imprisonment of Federal misdemeanor prisoners. RT 464, 716, 950-951. And in normal course a Federal prisoner committed to the Alameda County jail would be placed by the Sheriff of that county in the branch of the jail at Santa Rita. RT 660. The Bureau of Prisons has rules and regulations governing the custody of Federal prisoners and, among other things, such prisoners are protected from photographing and interviewing by the press. RT 481-482. It is against these rules and regulations to accord a Federal prisoner special privileges while in a local jail. RT 712-713. Such prisoner is subject to

the prison routine established by the Sheriff or other local authority, not by a United States Marshal. The Sheriff of Alameda County does not accord special privileges to a Federal prisoner confined in an Alameda County jail. RT 654-655.

Authorization from the Director of Prisons for confinement of Davis in a local jail had been obtained by the attorney representing Davis in the trial court as early as November of 1949, and the Director of Prisons, under date of November 29, 1949, had sent a telegram to John A. Roseen, then Acting United States Marshal, San Francisco, wherein he stated, "Have no objection if you and U. S. Attorney think commitment jail rather than McNeil Camp would be proper. If you agree please notify Attorney Sullivan." RT 446-447. Appellant had no knowledge of the existence of this telegram until it was shown to him by Mr. Roseen on March 5, 1951, and at the suggestion of Mr. Roseen appellant immediately obtained from the United States Attorney the consent required by the telegram before Davis could be committed to a local jail. RT 490-491, 810-816.

Davis had changed attorneys after he was convicted, and between February 26 and March 5, 1951, the attorneys who represented Davis on the appeal to this court and on the certiorari petition to the Supreme Court communicated with appellant and his office respecting the surrender and place of confinement of Davis, suggesting a time and place for such surrender that would avoid publicity and inquiring if he could be confined in a local jail. RT 812-813,

1114-1115. And on March 7, 1951, these same attorneys again communicated with appellant, after he was aware of the telegram of November 29, 1949 and had obtained the consent of the United States Attorney, and arranged a time and place for the surrender of Davis in Alameda County. RT 817, 1104-1107. At the time and place thus arranged Davis surrendered in Alameda County where he and his family lived and where his business was located, and he was taken to the Santa Rita branch of the Alameda County jail by Deputy United States Marshal Calmes. RT 819-821, 970-972.

The facts in the Davis case were before this court in *Davis v. United States*, 9 Cir. 185 F. 2d 938. It would be irrelevant to review or repeat them here. The case evoked a great deal of publicity, much public sympathy and sentiment for the injured child, and much public antipathy and resentment against Davis. This persisted after Davis was committed to the Santa Rita jail on March 7, 1951, and rumors reflecting on the Marshal's office began reaching appellant. RT 824, 908.

Appellant left for the east at 8:40 a.m. of March 19, 1951, to take a prisoner to Philadelphia, and he had in mind a routine call on the Director of Prisons and a discussion of the Davis case with him. RT 495-496, 825-826. He made that call in Washington on March 21, 1951. RT 709, 899. The Director of Prisons, James V. Bennett, was a witness for the government at the trial of this action (RT 696) and his recollection of what was said at that time differs from

appellant's recollection. Bennett's recollection was that appellant did not mention Davis' name, that as appellant was leaving he said he was "having a little trouble with one of the men out in the Oakland jail"—"something out of the ordinary"—who was asking "for some special privileges", that Bennett told appellant to "remove the man immediately"—"you can transfer him to McNeil Island or any other approved jail", and that appellant replied, "Leave it to me, I will take care of it". RT 709-713. Appellant's recollection of the conversation of March 21, 1951, was that he mentioned Davis' name to Bennett, told him of the rumors reflecting on the Marshal's office, and Bennett said, "Protect yourself, protect your office"—"transfer the man to McNeil Island or any other approved institution or jail". RT 829-830, 900-901.

Appellant returned to San Francisco from the east on March 22, 1951. RT 495-496. And defendant Calmes left for Honolulu on March 24, 1951, and did not return to San Francisco until April 4, 1951. RT 973. The record has it that on March 26, 1951, defendant Reynolds was told by Church that if any attempt was made to move Davis from Santa Rita to another jail the FBI would be called in. RT 50-51. And the record further has it that on March 26, 1951, the FBI was in fact called in by Davis and Church and attorneys then representing them. RT 170.

On March 30, 1951, appellant had an office conversation with his deputy James Egan in which he told Egan to telephone the Santa Rita jail (or the office of the Alameda County Sheriff) and tell them

Davis was being moved to McNeil Island as soon as another trip was ready for McNeil and for them to inform Davis that if he had any business to transact he had better do it soon. RT 516-519, 529-530. Egan telephoned as instructed. RT 517-519. This conversation in the Marshal's office occurred in the presence of Martin Lightbody, a special agent of the FBI. RT 529-530. Appellant knew at the time that Lightbody was a special agent of the FBI. RT 533, 835. And Lightbody knew at the time that the FBI was investigating the Davis case. RT 532. When Lightbody returned to the FBI office he reported the occurrence to his superior, made notes of what had occurred, and from the notes dictated a memorandum of the occurrences. RT 535-536. The conversation of March 30, 1951, was also confirmed by the testimony of appellant who added that he had instructed Egan to ask the Sheriff's office how long a notice it would require in order to get Davis ready. RT 834-836, 905-906.

No order to transfer Davis to McNeil Island was ever issued. RT 906.

Mention has already been made of the fact that defendant Calmes left for Honolulu on March 24, 1951, and did not return to San Francisco until April 4, 1951. RT 923. Church, who since March 26, 1951, was acting under the direction and supervision of the FBI, telephoned Calmes at his place of business in Oakland on April 5, 1951, and a conversation was had respecting Davis. RT 56-58. The court ruled that Church's testimony as to the contents of the

conversation was "received solely against the defendant Calmes". RT 57/16-17. The court later instructed the jury that "Sometimes evidence is limited to a certain purpose or to a certain defendant. When received and so limited you may consider it as it relates to the purpose or defendant to which or to whom it was limited. You may not otherwise consider it." RT 1494/3-7. Church also testified as to Church-Calmes conversations occurring on April 6, 1951 (RT 58-60), April 9, 1951 (RT 60-62), April 10, 1951 (RT 62-65), April 11, 1951 (RT 65-67), and April 12, 1951 (RT 67-68), some over the telephone and some at the Davis automobile agency. Under rulings of the court such testimony was also received solely against the defendant Calmes. RT 58/17-20, RT 60/17-19. These rulings make it unnecessary to burden this statement of the case with a summary of the Church-Calmes conversation.

There was no conversation at any time between Davis and appellant. There was, however, a conversation between Davis and Calmes at Santa Rita on April 10, 1951, and no ruling of the court limited the testimony of Davis respecting it to the case against Calmes. On that occasion defendant Calmes had with him an order for the transfer of Davis from Santa Rita to the Solano County jail (Fairfield). This was prepared at the suggestion of Chief Deputy Roseen after appellant had informed him of reports that Davis was having trouble at Santa Rita. RT 472-473. Davis narrates the Davis-Calmes conversation at Santa Rita on April 10, 1951, as follows (RT

248-249): "Mr. Calmes told me that Marshal Carrigan was very angry and that I was being moved to Fairfield. I asked him what Mr. Carrigan was angry about, and he said, well, there has been a lot of lies going around town, and they had found out that I had been paying money to various people, people who couldn't do me any good, and that Mr. Carrigan thought that inasmuch as I was tossing money around, they should have some of it, and they, the people who could do me some good, should have some of it, and he would like Mr. Calmes to have \$500 for himself", "And Mr. Calmes said I could give him the \$500 if I wished, or if I didn't we would still be friends, and that Mr. Carrigan would expect a new car for his old car after I got out, and that he now had a '50 Lincoln, I said I wasn't interested in any deals after I got out. I was more interested in staying in Santa Rita and not being thrown into some dangerous place than anything else. And I said, 'Just what are the demands that I will have to meet in order not to be molested any more and just live here?' " "He replied he didn't know. He would have to get in touch with Mr. Carrigan", "He would go out and phone Mr. Carrigan and leave me there", "I told him that I didn't wish to be moved", "He told me he had orders to move me to Fairfield".

The Davis-Calmes conversation of April 10, 1951, as narrated by Calmes, was more elaborate and differs from the Davis version in many respects. RT 983-986. Calmes immediately telephoned appellant, as promised Davis, saying that Davis was now satisfied,

that everything had been straightened out, he was being treated fine, and he wanted to stay at Santa Rita. RT 987. Appellant conferred with Chief Deputy Roseen the following morning and the order for the transfer of Davis was recalled. RT 474-475, 873-874.

The Davis-Calmes conversation in the afternoon of April 10, 1951, was preceded by two Calmes-Carrigan office conversations, one on April 9, 1951, and the other in the morning of April 10, 1951. At the conversation of April 9, 1951, and in answer to an inquiry by Calmes as to why Davis was being moved, appellant told Calmes he was tired of hearing rumors that Davis was paying money to be kept at Santa Rita, and instructed Calmes to find out about it and stop such rumors. RT 975-976, 1007-1008. At the conversation in the morning of April 10, 1951, Calmes told appellant that Church had informed him Davis was paying \$200 a month for special privileges at Santa Rita. Appellant determined upon a course of action. This consisted in having Calmes obtain from Davis a proposal to pay \$2000 directly to appellant. RT 838-841, 844-848, 978-981, 987-988, 1007-1008. Appellant disavowed any purpose of extorting money from Davis or accepting a bribe. RT 845, 865. His avowed purpose was "To bring out into the open some one, unknown, or one or more unknown people who apparently were putting pressure on either Davis or Church or both, with the direct threats of doing something to Davis". RT 849, 866. Calmes acted under the direction and supervision of appellant in

arranging with Church for the payment of this \$2000 by Davis. RT 877.

There were two conversations on April 12, 1951, between Church and appellant. The first conversation was over the telephone around 11:30 a.m., and as Church states it appellant was told the money was ready and after suggestions and countersuggestions a meeting was arranged for 2 p.m. on Mission Street between Sixth and Seventh Streets in San Francisco. RT 68. This does not differ substantially from the conversation as stated by appellant. RT 850-852. The second Church-Carrigan conversation on April 12, 1951, occurred at the time and place thus arranged. Church testified he walked up to appellant and spoke to him and said "the money is ready for you", and after appellant had berated Church and Davis "on the manner in which we handled things", Church reached into his pocket and handed appellant the money, ran across the street to his parked automobile, and from that position saw the FBI agents about to arrest appellant. RT 72-73. Appellant testified the conversation was more extensive, and that although repeatedly asked Church refused to name the person or persons supposed to have been putting pressure on Davis in the name of appellant, and that he accepted the envelope handed him by Church and was on his way with it to the United States Attorney's office when arrested by FBI agents. RT 855-860.

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in denying appellant's motion for judgment of acquittal.

2. The District Court erred in instructing the jury as follows:

“Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.” RT 1484/18-22.

“Mr. Burns: The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, ‘Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.’ It is my understanding of the law that there was to be concerted action in a conspiracy, and as I have indicated before there could be co-existent two separate conspiracies.” RT 1499/22 to 1500/5.

3. The District Court erred in denying appellant's motion for a new trial.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

The general conspiracy alleged in the indictment was not proved. There was no substantial evidence proving: (a) A continuing conspiracy from on or about January 27, 1951, up to and including April 12, 1951; (b) a conspiracy existing on or before January 27, 1951; (c) a conspiracy to which the appellant was party on or before March 26, 1951; (d) a conspiracy to which any of those named in the indictment as conspirators, other than Davis and Church and defendant Calmes and this appellant, were party after March 26, 1951.

Appellant's conviction of the general conspiracy cannot be sustained by evidence proving different and disconnected smaller conspiracies. Variance between indictment and proof would be fatal error as to appellant under the circumstances of the case.

Erroneous instructions on material issues operated to the substantial prejudice of appellant.

Denial of appellant's motion for a new trial was a manifest abuse of the discretion confided in the District Court.

2. THE JUDGMENT AGAINST APPELLANT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD THEREFORE BE REVERSED.

Specification of Error No. 1. The District Court erred in denying appellant's motion for judgment of acquittal.

Specification of Error No. 2. The District Court erred in denying appellant's motion for a new trial.

The indictment alleged that "on or about January 27th, 1951, and continuously thereafter up to and including the 12th day of April, 1951, the above named defendants, Edward J. Carrigan, Ray Calmes, Jack Reynolds, and Sam Neider, did, in the Northern District of California, Southern Division, conspire together, and with Phil Davis and John Church, with the intent and purpose to defraud the United States in the exercise of its governmental powers by impairing, obstructing and interfering with the lawful functions of a Department of the United States, to wit, the Department of Justice, the Bureau of Prisons thereof, and the Attorney General in attempting unlawfully and corruptly to influence, obstruct and impede said Attorney General and said Bureau in the designation of places of confinement where sentence shall be served and transfers made from one institution to another in connection therewith of a Federal prisoner theretofore committed to the custody of said Attorney General, said Federal prisoner being one Phil Davis".

The basis of this indictment was 18 U.S.C., sec. 371, which provided in pertinent part:

"If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not

more than \$10,000 or imprisoned not more than five years, or both."

With reference to continuing conspiracies the Supreme Court said in *Fiswick v. United States*, 329 U.S. 211, 216, 67 S.Ct. 224, 227, 91 L.Ed. 196:

"Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. See *United States v. Irvine*, 98 U.S. 450, 25 L.Ed. 193. Continuity of action to produce the unlawful result, or as stated in *United States v. Kissel*, 218 U.S. 601, 607, 31 S.Ct. 124, 126, 54 L.Ed. 1168, 'continuous co-operation of the conspiracy to keep it up' is necessary. A conspiracy is a partnership in crime. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253, 60 S.Ct. 811, 858, 84 L.Ed. 1129."

And in the present action the court instructed the jury as follows (RT 1485/11-23):

"In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in the indictment. It is necessary further that in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid, and that

such overt act or acts was in furtherance of the object of the conspiracy.”

For proof of the general conspiracy alleged in the indictment, that is, the continuing conspiracy from on or about January 27, 1951, up to and including April 12, 1951, the government relied upon the episode of January 27, 1951, as marking the inception and existence of the conspiracy. The conversation between Church and appellant at the Davis automobile agency on that date was alleged in the indictment as the first overt act. CT 2. As Church related that conversation, appellant attempted to make an even trade of an old automobile for an automobile of a later model and greater value, accompanying the attempt with the cryptic statement, “I guess Mr. Davis understands that after he is arrested I will have full charge of his custody” (RT 26). When the conversation occurred Davis was a potential Federal prisoner, being then out on bail after conviction of a Federal misdemeanor offense and his petition for certiorari was pending in the Supreme Court.

Unquestionably, appellant, a United States Marshal, showed bad judgment in going to the place of business of a potential prisoner for the purpose of entering into any sort of a business deal with him. Bad judgment, however, is not synonymous with criminal purpose or intent. And even if the testimony of Church as to what appellant said on January 27, 1951, be accepted at its deepest thrust it does not measure up to proof that appellant then or theretofore conspired

with any person or persons "with the intent and purpose to defraud the United States in the exercise of its governmental powers by impairing, obstructing and interfering with the lawful functions of a Department of the United States", or attempted "unlawfully and corruptly to influence, obstruct and impede said Attorney General and the said Bureau (of Prisons) in the designation of places of confinement where sentence shall be served and transfers made from one institution to another in connection therewith of a Federal prisoner theretofore committed to the custody of said Attorney General, said Federal prisoner being one Phil Davis".

The record leaves no doubt, moreover, that however the episode of January 27, 1951, may be viewed or appraised it resulted in failure, for no automobile trade was agreed to or made and appellant bought an automobile elsewhere.

Early in February of 1951 Davis sought the advice and assistance of his good friend defendant Neider with the objective of obtaining imprisonment for Davis in a local jail with special privileges if it became necessary for Davis to serve his sentence of 6 months. In turn, *on behalf of Davis*, and with the same objective, Neider sought the advice and assistance of his good friend defendant Reynolds. R/T 1058-1059.

It has already been mentioned that only the Director of Prisons, Washington, can authorize the imprisonment of a Federal prisoner in a local jail,

and that under general authorization from the Director of Prisons the imprisonment of Davis in an Alameda County jail would be lawful. Federal prisoners in such local jails are subject to the prison routine established by the local authorities, and it is contrary to the rules and regulations of the Bureau of Prisons to accord them special privileges. It is therefore obvious that before Davis could attain the objective of special privileges it would be necessary for Davis or those acting on his behalf to make clandestine and questionable arrangements therefor with the Sheriff of the county in which the local jail was located. The record here is plain that the Sheriff of Alameda County did not tolerate and would not tolerate special privileges for Federal prisoners committed to his custody.

Between this date early in February of 1951 and March 26, 1951, there were many conversations between Davis and Neider, Davis and Reynolds, Church and Neider, Church and Reynolds, and Neider and Reynolds, respecting their objective, and in some of these conversations the name of appellant was mentioned. The efforts of these other named defendants on behalf of Davis were terminated by him on March 26, 1951, and he called in the FBI on that date. The record contains no evidence of any conversation or communication between appellant and Davis or Church during that period. Nor does the record contain any evidence, direct or indirect, of any conversation or communication between appellant and Neider or Reynolds during that period. Appellant has al-

ready referred to the fact that Church's narration of conversations occurring during that period came into the record under rulings of the court limiting their application to the case against the defendant with whom Church talked. The Neider-Reynolds conversations need not be reviewed by appellant, for they reflect lawful efforts to attain by lawful means only so much of the contemplated objective as was lawful. The Davis testimony came into the record without limitation. It was later limited to some extent, however, by the ruling, accompanying the granting of the motion of defendant Neider for judgment of acquittal, whereby the Davis' testimony of Davis-Neider conversations was expunged from evidence.

There remains for consideration, therefore, only that part of the Davis testimony as to Davis-Reynolds conversations which seeks to implicate appellant as a conspirator by statements ascribed to appellant by Reynolds in his conversations with Davis. Otherwise stated, and measured by the allegations of the indictment, the Davis testimony under discussion amounted to what one coconspirator (Davis) said a second coconspirator (Reynolds) said a third coconspirator (appellant) said. Such evidence, if it may be termed such, does not amount to proof that appellant was a conspirator. *Mayola v. United States*, 9 Cir. 71 F. 2d 65. And even if the Davis testimony reflected an admission or declaration by appellant, which it does not, it could not have the legal effect of establishing the corpus delicti in a conspiracy case. *Colt v. United States*, 5 Cir. 160 F. 2d 650, 651; *Tabor v. United*

States, 4 Cir. 152 F. 2d 254, 257; *United States v. Di Orio*, 3 Cir. 150 F. 2d 938, 940; *Ryan v. United States*, 8 Cir. 99 F. 2d 864, 869.

From what has been said under this subdivision it accordingly follows that there is no substantial evidence in the record proving: (a) A continuing conspiracy from on or about January 27, 1951, up to and including April 12, 1951; (b) a conspiracy existing on or before January 27, 1951; and (c) a conspiracy to which appellant was a party on or before March 26, 1951.

On the record here it is plain that if a conspiracy existed on April 12, 1951, it was one that was formed on or after March 26, 1951, by Davis and Church acting under the direction and supervision of the FBI, and it reached out to include appellant and defendant Calmes after April 4, 1951, or it was one that was formed by appellant and defendant Calmes after the latter returned from Honolulu on April 4, 1951, and it reached out to include Davis and Church acting under the direction and supervision of the FBI.

It was the position of appellant at the trial that in the events leading up to the acceptance of \$2000 from Davis (Church) on April 12, 1951, he acted from honest motives and for the purpose of bringing to justice those who were sullyng it. RT 848-849, 865-866. Hindsight precludes appellant from contending that he was not guilty of inexcusable blundering and bungling. He does contend, however, that even if the events that transpired between March 26, 1951, and

April 12, 1951, be viewed, as they must be viewed, in the light most unfavorable to him, proof thereof will not suffice to convict him of the general and continuing conspiracy alleged in the indictment.

The main contention of appellant on his appeal is that there was a fatal variance between the indictment and the proof, that at most the proof established several conspiracies, and that appellant's conviction of the general conspiracy cannot be sustained by proof of that character. He invokes the principles considered and applied by the Supreme Court in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557, and by this court in *Canella v. United States*, 9 Cir. 157 F. 2d 470.

It is the position of appellant that the record refutes a conclusion that a conspiracy was formed or existed on or prior to January 27, 1951. This court may disagree. Should it do so, it would nevertheless be clear that such conspiracy was formed solely by appellant and defendant Calmes, and that it ended in failure on January 27, 1951, without having been joined by any of the others named in the indictment as conspirators. If a conspiracy or conspiracies existed after January 27, 1951, and up to March 26, 1951, it is nevertheless clear that such conspiracy was or such conspiracies were formed solely by those named in the indictment as conspirators other than appellant and defendant Calmes, and terminated on or before March 26, 1951, at the instance of Davis, and without being joined by appellant or defendant

Calmes. And if a conspiracy existed after March 26, 1951, and up to April 12, 1951, it is nevertheless clear that it was either formed by Davis and Church at the instance of the FBI or joined by them at the instance of the FBI and that neither defendant Neider nor defendant Reynolds ever joined it.

Thus viewed, it must inevitably follow that appellant was convicted of the general conspiracy on proof of several conspiracies. That he was substantially prejudiced thereby under the circumstances of the case is obvious. His conviction rested upon the dishonest and unlawful acts and statements of others which were not binding on appellant and for which he was not responsible. Their dishonest and unlawful statements prejudicially colored his own avowedly honest and lawful acts and statements. This case is plainly governed by the *Kotteakos* case and the *Carella* case, and the authority of those cases demands a reversal of the judgment against appellant.

3. ERRONEOUS INSTRUCTIONS ON MATERIAL ISSUES OPERATED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT.

Specification of Error No. 2. The District Court erred in instructing the jury as follows:

“Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.” RT 1484/18-22.

“Mr. Burns: The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, ‘Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.’ It is my understanding of the law that there has to be concerted action in a conspiracy, and as I have indicated before there could be co-existent two separate conspiracies.” RT 1499/22 to 1500/5.

The state of the record would permit the jury to find that there were at least two separate conspiracies, each of which was impregnated with the common design of extorting money or its equivalent from Davis by threats of the same character, and that appellant was party to one of them but not the other. Yet the challenged instruction authorized the jury to convict appellant of the general conspiracy merely because a common design was reflected in the two conspiracies. This was error. It is not at all improbable that the error resulted in the jury convicting appellant of the general conspiracy. The error was therefore prejudicial. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557; *Canella v. United States*, 9 Cir. 157 F. 2d 470.

4. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL.

Specification of Error No. 3. The District Court erred in denying appellant's motion for a new trial.

In his motion for new trial appellant specified insufficiency of evidence and error in the instructions. RT 152-153. The motion was denied and judgment and commitment followed. RT 166-167. The sufficiency of the evidence by appellant on motion for judgment of acquittal. RT 735-736. Insufficiency of the evidence to sustain a conviction is always plain error. *Lockhart v. United States*, 4 Cir. 183 F. 2d 265, 266; *United States v. Renee Ice Cream Co.*, 3 Cir. 160 F. 2d 353, 355. The denial of the motion for new trial therefore reflects a manifest abuse of discretion on the part of the District Court requiring a reversal of the judgment. *United States v. Johnson*, 327 U.S. 106, 111, 66 S.Ct. 464, 466, 90 L. Ed. 562.

Wherefore appellant respectfully submits that the judgment against him should be reversed.

Dated, San Francisco,

February 11, 1952.

JAMES E. BURNS,

Attorney for Appellant.

No. 13,118

IN THE

United States Court of Appeals
For the Ninth Circuit

RAY CALMES,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

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514 Easton Building, Oakland 12, California,

Attorneys for Appellant.

FILED

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No. 13,118

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RAY CALMES,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

The indictment filed in the United States District Court for the Northern District of California, Southern Division, charged appellant and others with the crime of conspiracy in that District in violation of 18 U.S.C., sec. 371, and 18 U.S.C., sec. 2401. (CT 1-3.) The District Court had jurisdiction, 18 U.S.C., sec. 3231; Rule 18, Federal Rules of Criminal Procedure. The appellant was convicted and was sentenced to imprisonment and fine by final judgment made and entered August 23, 1951. (CT 170-171.) Appellant's notice of appeal to this Court was filed August 29, 1951. (CT 175.) The appeal was timely, Rule 37 (a), Federal Rules of Criminal Procedure. Jurisdiction of this Court to review the final judgment of the District Court is sustained by 28 U.S.C., secs. 1291, 1294.

STATEMENT OF THE CASE.

The indictment was filed on April 18, 1951. (CT 3.) It charged that "on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951, the above named defendants, Edward J. Carrigan, Ray Calmes, Jack Reynolds, and Sam Neider, did, in the Northern District of California, Southern Division, *conspire together* (emphasis ours), and with Phil Davis and John Church, with the intent and purpose to defraud the United States in the exercise of its governmental powers by impairing, obstructing and interfering with the lawful function of a Department of the United States, to-wit, the Department of Justice, the Bureau of Prisons thereof, and the Attorney General in attempting unlawfully and corruptly to influence, obstruct and impede said Attorney General and said Bureau in the designation of places of confinement where sentence shall be served and transfers made from one institution to another in connection therewith of a Federal prisoner thereto committed to the custody of said Attorney General, said Federal prisoner being one Phil Davis, convicted in the United States District Court for the Northern District of California, in Action Number 10290, of having operated a motor boat on waters of Lake Tahoe in a reckless and negligent manner, contrary to the provisions of The Motor Boat Act of 1940, and sentenced to six months imprisonment and to pay a fine of \$1,500.00; and that during the existence of said conspiracy, one or more of the accused, as hereinafter mentioned by name, did the following acts in further-

ance of and to effect the object of said conspiracy:" (CT 1-2.)

Here five overt acts, in furtherance of the conspiracy, occurring between January 27, 1951, and April 12, 1951, were alleged; the single overt act directed at appellant was as follows (CT 3): "4. On April 11, 1951, said John Church had a conversation with said defendant Ray Calmes at said Phil Davis' Automobile Agency." (CT 3.)

A judgment of acquittal was entered by the Court on July 30, 1951, in favor of defendant Neider. (CT 12-13.) Appellant's motion for acquittal was denied. (RT 736-737.) The appellant and defendants Carrigan and Reynolds were found guilty by the jury on August 4, 1951. Appellant's motion for a new trial was made orally and denied August 23, 1951. By judgment and commitment on August 23, 1951, appellant was sentenced to imprisonment for two years and fined \$1,000.00. (CT 170-171.) Appellant filed his notice of appeal on August 29, 1951. (CT 174.)

The record on appeal is voluminous and is contained in eleven volumes. The first volume contains the clerk's transcript. (CT 1-178.) The other ten volumes contain the reporter's transcript. (RT 1-1511A.) The complexity of the fact situation, in addition to its lengthiness, is accentuated by the following factors:

Firstly, a large part of the testimony came into the record under rulings of the Court limiting it to the case against defendants other than this appellant. This is especially true of testimony given by John Church,

an alleged conspirator, though not a defendant, who testified at length concerning statements and declarations made in his presence by the various defendants. (RT 19.)

Secondly, testimony of Church and Davis, the latter another alleged conspirator, though not a defendant, concerning declarations made by defendant Neider was expunged as evidence by a ruling of the Court when Neider's motion for judgment of acquittal was granted. (RT 741-742.)

Thirdly, the testimony of government witnesses respecting alleged statements and declarations of defendant Carrigan after he was apprehended on April 12, 1951, was limited by rulings of the Court to the case against defendant Carrigan. (RT 665.)

For purposes of clarification, it is deemed advisable at this time to introduce the personnel of the alleged conspiracy or conspiracies and to dwell briefly upon their inter-acquaintanceships.

Appellant Ray Calmes was a Deputy United States Marshal. He had eight years experience and operated in the east bay area. He was a resident of Alameda County. During his period of employment he had served under Marshal Vice, acting Marshal Roseen and defendant Carrigan. (RT 962.) Appellant was not acquainted with defendant Carrigan prior to August 11, 1950. (RT 798.) During all periods of the alleged conspiracy or conspiracies, he was serving under defendant Carrigan. He did not see or talk with defendant Reynolds until *after* April 12, 1951, the

termination date of the alleged conspiracy or conspiracies. (RT 997-998.) Appellant did not become acquainted with defendant Neider until after April 12, 1951. (RT 1045.) Appellant became acquainted with Church in April, 1949, in connection with a marshal's sale of an automobile in Oakland, California. (RT 19.) Appellant became acquainted with Davis at the same date. (RT 229.) Sometime in the year 1950, appellant purchased an automobile from the Davis Automobile Agency. (RT 229.) Appellant frequently had his automobile serviced at the Davis Automobile Agency following the purchase of said automobile. (RT 990.)

Defendant Edward J. Carrigan was the United States Marshal for the Northern District of California. (RT 797.) He had been appointed to that office on April 11, 1950, by the President. (RT 797.) Immediately prior to his appointment, he was postmaster of the City of San Mateo. (RT 798.) He had had no prior experience with the type of work associated with the marshal's office. Carrigan became acquainted with appellant Calmes, his deputy, when taking office. (RT 798.) He knew of the existence of defendant Reynolds and had met him on two or three occasions, all prior to January 27, 1951. (RT 798.) He had no contact, personally or verbally, directly or indirectly, with Reynolds between January 27, 1951, and April 12, 1951. (RT 798-799.) Reynolds had opposed Carrigan's candidacy for United States Marshal by actively supporting a rival candidate. (RT 882, 1277-

1278.) Carrigan became acquainted with Church and Davis at the Phil Davis Automobile Agency on January 27, 1951. (RT 800, 803.) Carrigan did not meet Church again until April 12, 1951. (RT 79, 91, 809.) He never saw Davis after January 12, 1951, until the date of the trial of this action. (RT 250, 809.)

John L. Church, named as a conspirator but not as a defendant, was general manager of the Phil Davis Automobile Agency. (RT 19.) He assumed this position March 1, 1949. (RT 19.) Church became acquainted with appellant in the year 1949. (RT 19.) This meeting came about during the course of a marshal's sale in the City of Oakland, at which sale appellant and Church were acting in the furtherance of their respective duties as deputy marshal and sales manager. (RT 20.) Church saw appellant on occasions thereafter when appellant would have his car serviced at the Phil Davis Automobile Agency. (RT 20, 990.)

Phil Davis is and was, at the time of the alleged conspiracy or conspiracies and prior thereto, the owner of an automobile agency in Oakland. In July, 1949, Davis had been convicted in the United States District Court, at Sacramento, California, of a misdemeanor, to-wit, the offense of violating the Motor Boat Act, 46 U.S.C., sec. 526. He was sentenced to six months imprisonment. This Court affirmed the judgment on December 11, 1950. (*Davis v. United States*, 9 Cir. 185 F. (2d) 938.) The Supreme Court denied a petition for certiorari on February 26, 1951. (*Davis v. United States*, 340 U.S. 932, 71 S.Ct. 495.) From July, 1949, to

March 7, 1951, Davis was out on bail. An order to take Davis into custody was issued by the District Court, at Sacramento, California, and reached the marshal's office in San Francisco on March 5, 1951. (RT 480.)

Shortly prior to January 27, 1951, appellant and defendant Carrigan had a discussion in the marshal's office in San Francisco concerning the prospective trade of Carrigan's 1947 Pontiac automobile for a later model Chrysler. (RT 963-964.) Carrigan indicated he was in the market for a 1950 model Chrysler automobile and had investigated the matter at various agencies in San Francisco and on the Peninsula. (RT 964.) Appellant suggested that the Phil Davis Automobile Agency had some models available. (RT 964.) Carrigan asked appellant to find out what particular models the Davis Agency had in stock. (RT 964.) In pursuance of this conversation, appellant, at Carrigan's request, made an appointment for Carrigan with Davis and Church on January 27, 1951, at 11:00 o'clock A.M.. (RT 24.) Appellant introduced Carrigan to Church and these two held a conversation. (RT 25.) The testimony is conflicting as to what was said at that time and place. In any event, appellant took no part in the conversation. (RT 24, 25, 968.) Carrigan and appellant Calmes left the agency, entered their respective automobiles and departed. (RT 968.) Church testified that appellant said, "I think it will be worth Phil Davis' while to make *that* (emphasis ours) deal with Carrigan." (RT 27.) No explanation was ever offered as to what the words "that deal" referred. Car-

rigan purchased a Lincoln automobile at another agency. (RT 969.)

As of January 27, 1951, Davis was out on bail pending his appeal and following his conviction in the United States District Court at Sacramento. The case had received much publicity. There was a public feeling of sympathy extant for the child whose injury was caused by Davis' negligent operation of his motor boat, and Davis himself was the object of public antipathy.

Davis' petition for certiorari was denied on February 26, 1951. (RT 257, 1114.) Davis' attorneys communicated with Carrigan respecting a place of surrender which would be least embarrassing to Davis and would cause him the least publicity. (RT 1115.) A member of the law firm which represented Davis at the time made a personal visit to defendant Carrigan at his office to determine if it was possible for Davis to serve his sentence at a local county jail. On March 7, 1951, Davis surrendered to appellant one block from his place of business in Alameda County, and he was taken to the Santa Rita Rehabilitation Center, a branch of the Alameda County Jail. (RT 819-821, 970-972.)

Defendant Reynolds' first contact with the *Davis* case was before Davis went to trial. (RT 1208.) At that time, defendant Neider, in behalf of his friend Davis, asked Reynolds if he could aid or advise Davis. (RT 1208-1210.) Reynolds answered that he could not. (RT 1209.) In November, 1949, Neider asked Reynolds

if he could recommend an attorney for Davis. (RT 1211.) Davis had been convicted and his case had reached the appeal stage. (RT 1211-1212.) Reynolds made a recommendation and Davis employed the attorney. (RT 1212-1213.) Early in February, 1951, the *Davis* case was pending in the Supreme Court. Neider asked Reynolds if he thought it could be arranged for Davis to serve his sentence in a local county jail. (RT 1225.) Reynolds said he would contact a friend, one Augustine F. Gaynor, regarding this matter. (RT 1226.) A short time later Reynolds told Neider that the matter could be arranged; that it would have to be handled in Washington, and that the expenses would be \$1,000.00. On February 10, 1951, Reynolds, Neider and Davis had a meeting regarding this matter, at which time no decision was made as to a positive course of action. (RT 1232-1234.) On March 15, 1951, Reynolds advised Neider that on the following day he was leaving to go to Santa Monica for a labor convention. (RT 1243.) Neider asked Reynolds to stop en route to see Davis. (RT 1244.) Reynolds did so. At this conversation, according to Reynolds' testimony, Davis said he was afraid he would be moved to McNeil Island. (RT 1250.) Davis told Reynolds he wanted to see Neider. (RT 1251.) Neider visited Davis at Santa Rita on March 18, 1951. (RT 1074.) At this time Davis asked Neider to contact Reynolds and have him proceed with the arrangements to assure his imprisonment in a local jail. (RT 1079.) Neider mentioned the expense of \$1,000.00 and Davis suggested a payment of \$500.00 and a second payment of \$500.00

when he was assured he would remain at Santa Rita or some other local jail. (RT 1079.) Neider promised to make the payment when Reynolds returned from the south. (RT 1080.)

On March 19, 1951, Church telephoned Neider and advised him that Davis had instructed Church to give \$500.00 to Reynolds. (RT 1081.) On March 19, 1951, Church left \$500.00 for Reynolds in an envelope at the cigar stand of the Union Club in Oakland. (RT 40.) After Reynolds returned from the south, on March 21, 1951, he telephoned Neider and asked why the envelope contained only \$500.00 instead of \$1,000.00. (RT 1181, 1256.) Neider explained the alternative proposition formulated by Davis, that he would pay an additional \$500.00 when he was assured he would remain in a local county jail. (RT 1181.) Reynolds conferred with Gaynor on March 20, 1951, and attempted to persuade him to go to Washington on the contingency basis. (RT 1258-1259.) Gaynor refused flatly and insisted he be paid \$1,000.00 before he would leave for Washington. (RT 1260, 1406-1409.)

Neider made an appointment for Church to meet Reynolds on March 23 or 24, 1951. The meeting occurred with Reynolds, Church and Neider participating. (RT 1182-1183.) At this meeting Reynolds offered to return the \$500.00 to Church. (RT 47.) Church said he had no authority to receive it. (RT 47.) On March 25, 1951, Church visited Davis at Santa Rita. (RT 49.) On March 26, 1951, Church had a

meeting with Reynolds at Reynolds' office in the Labor Temple in Oakland. (RT 50.) The testimony of Church and Reynolds is conflicting as to the essence of this conversation. (RT 50-51, 1269-1273.) At this meeting Reynolds returned the identical \$500.00 to Church. (RT 50-51.)

On March 7, 1951, appellant had taken Davis to the Santa Rita Rehabilitation Center. (RT 970-972.) Appellant had no further contact with Davis or Church until April 5, 1951. (RT 58.) Appellant left for Honolulu on a vacation on March 24, 1951, and returned to San Francisco April 4, 1951. (RT 923.) Effective March 26, 1951, Church was acting under the direction and supervision of the F.B.I., whom he had contacted on that date. On April 5, 1951, Church telephoned appellant at his place of business in Oakland. (RT 57.) Church told appellant that efforts had been made to move Davis to McNeil Island and asked appellant what he knew about it. (RT 57.) Appellant stated that he had just returned from Honolulu, that he would contact the marshal (Carrigan) and would then get in touch with Church. (RT 58.)

On April 6, 1951, appellant visited Church at his office at the Phil Davis Automobile Agency. (RT 58, 974.) The testimony is conflicting as to the substance of this conversation. Appellant testified that Church again stated he had been informed that Davis was going to be transferred to McNeil Island and inquired whether it was because they had not given Carrigan a better deal on an automobile. (RT 974.) Appellant replied that Carrigan had better offers on a car deal

and that Carrigan was not interested in any way in any car deal. (RT 974.) Church then asked appellant to find out why they were transferring Davis. (RT 974.) Appellant told Church he would let him know. (RT 974.) Church's testimony as to the conversation was that appellant stated he had talked to Carrigan (RT 58); that Carrigan told appellant he was disturbed over the fact that so much publicity had been directed toward the marshal's office as a consequence of Davis' arrest. (RT 59.) On April 9, 1951, appellant returned to his position as Deputy United States Marshal. (RT 974.) On that day appellant told Carrigan that Church had asked about the imminence of the Davis transfer. (RT 975.) Carrigan replied, "That is right." Carrigan said he was tired of hearing all of these rumors about him being paid to keep Davis at Santa Rita and wanted to get to the bottom of it to stop them. (RT 975.) Carrigan *ordered* appellant to return to Oakland to ferret out the source of the rumors and to learn as much about the situation as he could. (RT 976.) Appellant then visited Church at the Davis Agency on April 9, 1951. (RT 60, 976.) Again the testimony concerning this conversation is conflicting. Appellant's testimony is that he advised Church that Carrigan was tired of the rumors regarding Davis' prospective transfer, that he felt Church was the source of the rumors, and that Carrigan intended to trace the rumors to their source. (RT 976.) Church's version is that appellant stated that Carrigan had suggested that Davis give appellant a new car. (RT 60.) Church told appellant that

they had offered \$200.00 a month for five months to Neider for special privileges at Santa Rita (RT 977-978); that Neider had told Church the money was going to Carrigan. (RT 977.)

On April 10, 1951, appellant had a conversation with Carrigan during which he asked the latter if he had any agreement with anyone for special privileges for Davis. (RT 979.)^{*} Appellant then told Carrigan that Church had said that Davis had made an agreement to pay \$200.00 a month for five months, and that when Church paid \$500.00, they wanted \$1,000.00. (RT 979.) Carrigan asked to whom the money had been paid. (RT 979.) Appellant told him it had been paid to Neider. (RT 979.) Carrigan became enraged and said that he "had a good mind to go up and have those s. b.'s indicted right now." Appellant cautioned Carrigan that the only evidence they had at the time was Church's word. (RT 979.) Carrigan then said, "You go back there and tell them what we want," or "go back and tell them that if they were throwing any money around to throw it our way," and, "We will get to the bottom of this. I don't believe Church has been paying any money out. I believe he has been keeping it and spreading the rumors that he is paying it to somebody and using my name, and that is where all the rumors have been started." Later appellant cautioned Carrigan against moving Davis to McNeil Island, on the theory that it would be playing into the hands of the parties who were threatening Davis with such removal. (RT 981.) Appellant suggested that Carrigan remove Davis to the county jail at Fairfield,

California. (RT 63, 981.) Carrigan then had the Davis transfer orders made out to Fairfield. (RT 981.)

Pursuant to his orders from his superior, Carrigan, appellant called on Church that afternoon, April 10, 1951, at the Davis Agency. (RT 63, 981.) Appellant advised Church that Davis was being transferred to Fairfield that day by appellant, in accordance with orders issued by Carrigan. (RT 63, 982.) Appellant advised Church that if he had any questions of business to discuss with Davis, he should visit Davis that day. (RT 63, 982.) When appellant arrived at Santa Rita, Church was conferring with Davis. Appellant then advised Davis he had come to remove him to the Fairfield County Jail, that Carrigan wanted to remove Davis from this place. Davis, who at an earlier date had been importuning about his treatment at Santa Rita, then advised appellant that he desired to remain there. (RT 983.) Appellant advised Davis he had no authority to allow him to remain. (RT 983.) Davis requested that appellant telephone Carrigan and convey to him his desire to remain at Santa Rita. (RT 984.) Appellant then telephoned Carrigan. (RT 986.) Appellant conveyed Davis' message to Carrigan and returned home. (RT 987.)

On April 11, 1951, appellant had a conversation with Carrigan at the marshal's office. (RT 987.) He again stated to Carrigan that Davis desired to remain at Santa Rita. (RT 987-988.) Appellant also told Carrigan that Davis had suggested a cash deal and wanted him to name an amount. (RT 988.) Carrigan replied, "That is all right. We will work that out and maybe

we can get the whole bunch all at once." Carrigan then ordered appellant to visit Church and advise Church that "we want \$2,000.00". (RT 988.)

Pursuant to *Carrigan's instructions*, appellant then visited Church at the Davis Agency. (RT 988.) Appellant conveyed Carrigan's message to Church. (RT 988-989.) Church said he would verify the matter with Davis. (RT 989.)

On the morning of April 12, 1951, Church telephoned appellant and advised him that he had conferred with Davis, that Davis had verified the transaction, but that he had given orders that \$2,000.00 should be paid directly to Carrigan. (RT 67, 989.) Appellant conveyed this message to Carrigan. (RT 67-68, 989.)

From that morning on, the record is concerned with the meeting of Church and Carrigan that afternoon, April 12, 1951, in San Francisco, when the F.B.I. apprehended Carrigan with the \$2,000.00 in his possession.

SPECIFICATION OF ERRORS.

1. The District Court erred in denying appellant's motion for judgment of acquittal.
2. The Court erred in instructing the jury as follows:

"Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by com-

mon or different means, all leading to the same unlawful result.” (RT 1484, lines 18-22.)

“Mr. Burns. The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, ‘Although as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.’ It is my understanding of the law that there has to be concerted action in a conspiracy, and as I indicated before there could be co-existent two separate conspiracies. * * *” (RT 1499, line 22 to 1500, line 5.)

“Mr. Deasy. I raise the same objection, may it please the Court.” (RT 1500, lines 7-8.)

3. The District Court erred in denying appellant’s motion for a new trial.

SUMMARY OF ARGUMENT.

(a) Appellant’s contention is that the general conspiracy alleged in the indictment is not supported by substantial evidence. The indictment alleged a conspiracy continuing from on or about January 27, 1951, up to and including April 12, 1951. On March 26, 1951, and thereafter, Davis and Church were acting under orders of the FBI and hence could not be parties to the conspiracy. At the trial the District Court granted a judgment of acquittal in favor of defendant Neider, another alleged co-conspirator. The record contains

no evidence that appellant ever communicated or was even remotely associated in any way with defendant Reynolds regarding the question of Davis' imprisonment. From April 9, 1951 to April 12, 1951, appellant was merely following the instructions of his superior officer, defendant Carrigan.

(b) Appellant urges that his conviction as a co-conspirator in a general conspiracy cannot be supported by evidence proving two or more isolated and separate conspiracies on the basis of the reasoning in the *Kotteakos* and *Canella* cases. (*Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Canella v. United States*, 157 F. (2d) 470.)

Appellant urges reversal of judgment on the basis that erroneous instructions operated to his prejudice.

Appellant urges that his motion for a new trial should have been granted on the basis of a substantial variance between the allegations of the indictment and the proof as adduced at the trial.

ARGUMENT.

1. THE JUDGMENT AGAINST THE APPELLANT SHOULD BE REVERSED ON THE BASIS THAT IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The indictment charged that "on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951" the defendants Edward J. Carrigan, Ray Calmes, Sam Neider and Jack Reynolds *conspired together* (emphasis ours) and with Phil Davis and John Church to defraud the

United States in the exercise of its governmental functions by unlawfully attempting to influence, obstruct, and impede the Attorney General and the Bureau of Prisons in the designation of the places of confinement where sentence shall be served and transfers made from one institution to another in connection therewith of a Federal prisoner theretofore committed to the custody of said Attorney General, said Federal prisoner being one Phil Davis.

The sole overt act ascribed to appellant was as follows:

“4. On April 11, 1951, said John Church had a conversation with said defendant Ray Calmes at said Phil Davis Automobile Agency.”

At the conclusion of the government's case, defendant Neider moved for judgment of acquittal, which motion was granted.

The record indicates that the entire association of defendant Reynolds to the alleged conspiracy or conspiracies was conducted either through Neider as an intermediary, or directly with Church or Davis. The record fails to show that Reynolds ever communicated in any form or manner with appellant or defendant Carrigan during the entire period of the alleged conspiracy or conspiracies.

There remains as possible general conspirators only appellant, defendant Carrigan, and Davis and Church. On *March 26, 1951* (emphasis ours) Davis and Church contacted the FBI and subsequent to that date both men were acting in accordance with directions issued

by the agents of that Federal agency. (RT 296-297.) Accordingly, on and after March 26, 1951, both Davis and Church ceased to be parties to any conspiracy. The intent to defraud which is a vital element of this conspiracy was lacking in Davis and Church. (*United States v. Socony Vacuum Oil Co.*, 310 U.S. 150.)

It will be noted that the indictment alleges January 27, 1951 as the commencement date of the general conspiracy. (CT 1.) The first overt act alleged in the indictment is that, "On January 27, 1951, said defendant Edward J. Carrigan met said John Church at the Phil Davis Automobile Agency, 2547 E. 14th Street, Oakland, California, and they held a conversation together." (CT 4.)

Appellant's only association with the January 27, 1951 incident was to arrange the appointment between defendant Carrigan as a prospective automobile purchaser with Davis and Church, as prospective sellers. (RT 965.) Appellant was present at this meeting but as he was not in the market for an automobile at that time he took little or no part in the conversation. (RT 966-968.) Appellant's next contention with the matter was on March 7, 1951, when Davis surrendered to appellant and was taken to the Santa Rita Rehabilitation Center, a branch of the Alameda County Jail. (RT 819-821, 970-972.) There is nothing in the record to indicate that appellant made any demands of any nature of Davis and Church between January 27, 1951 and March 7, 1951, when appellant took Davis into custody, and between March 7, 1951 and March 24, 1951, when appellant left for Honolulu on a vaca-

tion trip. (RT 973.) Appellant returned from Honolulu on April 4, 1951. But, as stated, on March 26, 1951, Davis and Church had contacted the FBI and were no longer parties to the conspiracy. (RT 92, 296, 297.)

Consequently, on April 5, 1951, the general and continuing conspiracy composed of six members, as alleged in the indictment, had dwindled to the appellant and his superior officer (Carrigan) and a third co-conspirator (Reynolds) with whom appellant had never communicated at any time. Neider was later acquitted by the trial Court on his own motion, and as explained, Davis and Church were operating under the supervision and direction of the FBI.

On April 5, 1951, Church telephoned appellant and a conversation followed. (RT 57, 973.) At this time Church told appellant that efforts had been made to transfer Davis to McNeil Island. (RT 57, 973.) Church asked appellant to investigate the matter and appellant assured him he would. (RT 57, 973.) On April 6, 1951, appellant visited Church at the Davis Agency in Oakland. (RT 59, 974.) At this meeting, by the testimony of Church himself, appellant stated that Carrigan was disturbed over the publicity which had come to the Marshal's office as a consequence of Davis' arrest. (RT 58, 59.)

On April 9, 1951, appellant resumed his official duties. (RT 975.) Subsequent to that date appellant, acting in his capacity as Deputy United States Marshal, operated entirely under the direction of, and

pursuant to orders given by his superior, defendant Carrigan. (RT 976, 979.)

Reviewing these points in the record, the judgment against appellant should be reversed on the basis that it is not supported by substantial evidence. Appellant's motion for judgment of acquittal based on the grounds of insufficiency of evidence was denied. Appellant may challenge this error on appeal despite challenge or failure to challenge in the trial Court. (*Bryan v. United States*, 338 U.S. 552; *United States v. Gardner*, 171 F. (2d) 753; *Karn v. United States*, 158 F. (2d) 568. Federal Rules of Criminal Procedure, Rules 29, 59, 18 U.S.C.A., following sec. 687.)

(b) Appellant earnestly urges on appeal that there was a fatal variance between indictment and proof. Allegations of the indictment claim a general conspiracy. The proof established, if at all, two or more isolated conspiracies. On the basis of the holdings in the *Kotteakos* and *Canella* cases, appellant's conviction as a general conspirator cannot be sustained. (*Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Canella v. United States*, 157 F. (2d) 470.)

On January 27, 1951, the commencement date of the conspiracy, as alleged in the indictment, defendant Carrigan had a conversation with Church at the Phil Davis Automobile Agency. Church's testimony indicates that defendant Carrigan sought, without success, to use his position as United States Marshal to obtain a new model Chrysler automobile in exchange for his 1947 Pontiac, from the Davis Agency. Appel-

lant was present at this conversation but took little or no part in it. Church rejected the proposed exchange. Church, then was not a conspirator at this time. Defendant Reynolds was never a party to this incident. Carrigan purchased an automobile elsewhere. (RT 869-870.) If conspiracy there was on this date, it commenced and ended during the half hour period that Carrigan conversed with Church.

The next phase of the series of events involves only Church and Davis and defendants Reynolds and Neider. It extends from early in the month of February, 1951, to March 26, 1951. There is nothing in the record to indicate that appellant was a party to any of the conversations, communications or acts with any of these men.

On or about February 1, 1951, Neider, who was a friend and business associate of Davis, telephoned Davis and informed him that he (Neider) might have an arrangement that would be helpful to Davis in his present trouble. Neider advised Davis to contact defendant Reynolds. Davis did so. The testimony of Davis is that Reynolds said he was a good friend of Carrigan and that for \$200 a month for 5 months Davis would be placed in the Solano County jail and would be given special privileges. Davis agreed to "go along with the deal". On March 7, 1951, Davis was taken into custody and imprisoned at the Santa Rita Rehabilitation Center. On March 16, 1951, Reynolds called on Davis and advised him that if \$500 were not paid immediately, Davis would be transferred to McNeil Island. Pursuant to instructions given by

Davis, Church left \$500 for Reynolds at the Union Club in Oakland. Reynolds was in the Los Angeles area at the time. The testimony of Reynolds and Neider was that this was part payment of \$1,000 by Davis as expense money to send a representative, one Augustine F. Gaynor, to Washington in order to obtain from the Director of Prisons authorization for Davis to serve his imprisonment in a local county jail. Reynolds testified that this partial payment was unsatisfactory to Gaynor. The identical \$500 was returned to Church by Reynolds on March 26, 1951.

During this series of events which commenced on or about February 1, 1951, and terminated on March 26, 1951, appellant had no communication with any of these participants other than to take Davis into custody on March 7, 1951. Accordingly, if a conspiracy did exist, during this period, it was a separate one involving only Davis, Church and Reynolds. The inter-relationship of these men during this period was completely isolated from any connection with appellant. And if a conspiracy existed, it terminated on March 26, 1951, when defendant Reynolds returned the identical \$500 to Church.

The final transaction commenced on April 5, 1951, when Church telephoned appellant and it terminated on April 12, 1951, when defendant Carrigan was apprehended by the FBI. During this entire period Church and Davis were acting under the direction and supervision of the FBI. As such, they were not parties to any conspiracy. Their participation in the matter was not in furtherance of the criminal enter-

prise (*Fiswick v. United States*, 329 U.S. 211); rather, it was a frustration of it. There was no partnership in crime. If conspiracy there was, it existed solely between appellant and his superior officer, defendant Carrigan.

Accordingly, as the indictment alleges a general and continuing conspiracy, appellant was convicted by evidence proving at least three isolated and separate conspiracies. It is settled law that when the indictment alleges a single conspiracy and the proof establishes two or more separate and disconnected conspiracies, the variance is fatal and conviction cannot be sustained. (*Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Canella v. United States*, 157 F. (2d) 470; *Brooks v. United States*, 164 F. (2d) 142; *United States v. Wills*, 36 F. (2d) 855.)

2. JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED ON GROUNDS THAT ERRONEOUS INSTRUCTIONS BY THE COURT ON MATERIAL ISSUES OPERATED TO APPELLANT'S PREJUDICE.

The Court erred in instructing the jury as follows:

“Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.” (RT 1484, lines 18-22.)

“Mr. Burns: the only objection, if Your Honor please, for the record is in instruction No. 13, where

Your Honor said, ‘Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.’ It is my understanding of the law that there has to be concerted action in a conspiracy, and as I have indicated before there could be co-existent two separate conspiracies.” (RT 1499, line 22 to RT 1500, line 5.)

“Mr. Deasy: I raise the same objection, may it please the Court.” (RT 1500, lines 7-8.)

On the basis of the record the government failed to show by the proof that all of the defendants were parties to the same scheme or common design. According to the challenged instructions the jury could have found that there were two or more co-existent but separate and isolated conspiracies in which the sole semblance of unanimity was the common design of extorting either money or an automobile out of Davis. It is conceivable that the ensuing confusion in the minds of the jurors, resulting from this instruction, resulted in their convicting the appellant of the general conspiracy. This was prejudicial error. (*Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Brooks v. United States*, 164 F. (2d) 142.)

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL, HENCE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED.

In his oral motion for a new trial, appellant specified the error in instructions and also the variance between the allegations of the indictment which charged a general and continuing conspiracy and the proof which revealed, if at all, two or more isolated and separate conspiracies. The motion was denied and judgment and commitment followed. The laws of pleading and evidence will have to be re-written before variance of such magnitude between the allegations of the indictment and proof can bear the stamp of judicial approval. (*Enrique Rivera v. United States*, 57 F. (2d) 816; *United States v. Di Genova*, 134 F. (2d) 466.)

Wherefore, appellant respectfully submits that the judgment against him should be reversed.

Dated, Oakland, California,
March 17, 1952.

DEASY, DODGE & EVANS,
Attorneys for Appellant.

No. 13,118

United States Court of Appeals
For the Ninth Circuit

EDWARD J. CARRIGAN, RAY CALMES
and JACK REYNOLDS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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No. 13,118

United States Court of Appeals For the Ninth Circuit

EDWARD J. CARRIGAN, RAY CALMES
and JACK REYNOLDS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

OPINION.

The oral statement of Judge Lemmon (Tr. 157-162)¹ denying the several motions of appellants for a new trial is not reported.

QUESTIONS PRESENTED.

1. Whether the evidence supports appellants' conviction under the indictment charging them with a general conspiracy.

¹The symbol "Tr." refers to the typewritten transcript of the record on appeal; and the symbol "R." to the reporter's typewritten transcript of the trial proceedings.

2. Whether the trial Court erred in its instruction to the jury to the effect that the existence of a conspiracy among several individuals may be inferred from their steady course of individual conduct "leading to the same unlawful result".

3. Whether the trial Court abused its discretion in denying appellants' several motions for a new trial.

STATUTORY PROVISIONS INVOLVED.

18 U.S.C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 4082 provides in pertinent part as follows:

Persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences shall be served.

The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted.

The Attorney General may order any inmate transferred from one institution to another.

STATEMENT OF JURISDICTION.

Appellants appeal from several judgments of conviction rendered on August 23, 1951 (Tr. 166-171), after a trial before Judge Dal M. Lemmon and a jury, in the United States District Court for the Northern District of California, Southern Division (R. 1-1511-A), wherein they were found guilty (Tr. 151) upon a one-count indictment, filed April 18, 1951, which charged them and one Neider² with a violation of 18 U.S.C. 371, in that, during 1951, they conspired in that district to defraud the United States. (Tr. 1-3.) Motions for a new trial by Carrigan (Tr. 152-153) and Reynolds (Tr. 154-156) were denied. (Tr. 162.) Carrigan was sentenced to five years' imprisonment and to pay a \$5,000 fine (Tr. 164); Reynolds to three years' imprisonment and a \$3,000 fine (*id.*); and Calmes to two years' imprisonment and a \$1,000 fine. (Tr. 165.)

²Motion for judgment of acquittal (R. 739) was granted as to Neider at the end of the Government's case. (R. 741; Tr. 12-13.) Similar motions on behalf of appellants (R. 735-739) were denied. (R. 741-742.)

The jurisdiction of the District Court was based upon 18 U.S.C. 3231 and Rule 18, F.R. Crim. P. On August 23, 1951, Carrigan and Reynolds each filed a notice of appeal (Tr. 172-173); and on August 29, 1951, Calmes also filed a notice of appeal. (Tr. 174.) The appeals are timely. See Rules 37(a)(2) and 45(a), F.R. Crim. P. The jurisdiction of this Court to review the judgment of the trial Court rests upon 28 U.S.C. 1291 and 1294.

THE INDICTMENT.

The indictment charges a violation of 18 U.S.C. 371, 4082,³ as follows (Tr. 1-3):

That on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951, the above named defendants, Edward J. Carrigan, Ray Calmes, Jack Reynolds, and Sam Neider, did, in the Northern District of California, Southern Division, conspire together, and with Phil Davis and John Church, with the intent and purpose to defraud the United States in the exercise of its governmental powers by impairing, obstructing and interfering with the lawful functions of a Department of the United States, to-wit, the Department of Justice, the Bureau of Prisons thereof, and the Attorney General in attempting unlawfully and corruptly to influence, obstruct and impede said Attorney General and said Bureau in the designation of places of confinement where sentence shall be served and transfers made

³Through inadvertence, the indictment cites 18 U.S.C. 2401.

from one institution to another in connection therewith of a federal prisoner theretofore committed to the custody of said Attorney General, said federal prisoner being one Phil Davis, convicted in the United States District Court for the Northern District of California, Northern Division, in Action No. 10,290, of having operated a motor boat on waters of Lake Tahoe in a reckless and negligent manner, contrary to the provisions of the Motor Boat Act of 1940, and sentenced to six months' imprisonment and to pay a fine of \$1,500; and that during the existence of said conspiracy, one or more of the accused, as hereinafter mentioned by name, did the following acts in furtherance of and to effect the object of said conspiracy:

1. On January 27, 1951, said defendant Edward J. Carrigan met said John Church at the Phil Davis Automobile Agency, 2547 E. 14th St., Oakland, California, and they held a conversation together.

2. On or about February 1, 1951, a telephone conversation was held between said Phil Davis and said defendant Sam Neider, in the City of Oakland, County of Alameda, California.

3. On or about February 10, 1951, said Phil Davis had a conversation with said defendant Jack Reynolds near the Union Club of Oakland, 285 23rd Street, Oakland, California.

4. On April 11, 1951, said John Church had a conversation with said defendant Ray Calmes at said Phil Davis' Automobile Agency.

5. On April 12, 1951, on Mission Street between Sixth and Seventh Streets, in the City and County of San Francisco, State of California, about 2:13 o'clock in the afternoon of said day, said defendant Edward J. Carrigan had a conversation with said John Church, and said John Church delivered to the said Edward J. Carrigan the sum of \$2,000 in United States currency, and said Edward J. Carrigan accepted the same.

STATEMENT OF FACTS.

The evidence adduced by the Government may be summarized as follows:

On November 7, 1949, Phil Davis,⁴ an automobile dealer in Oakland, California, was sentenced in the United States District Court for the Northern District of California, Northern Division, to six months' imprisonment and to pay a \$1,500 fine following his conviction on an information which had charged him with a violation of the Motor Boat Act (46 U.S.C. 526(1) and (m)), in that he had recklessly operated a motor boat on Lake Tahoe so as to have endangered the life and limb of certain individuals. (R. 17-18, 228; Gov. Ex. 1, R. 17.)

On November 29, 1949, the Director of the Bureau of Prisons, Department of Justice, Washington, D.C., had, by telegram, advised John Roseen, then acting as United States Marshal at San Francisco, that, "because of pending civil case" against Davis resulting

⁴Davis was one of two co-conspirators named, but not indicted, with appellants in the indictment herein considered.

from the Lake Tahoe offense, the bureau had “no objection”, provided the marshal and the U.S. Attorney agreed, to having Davis serve his sentence in a local jail “rather than McNeil camp”, as requested by his trial counsel. (R. 147, 444-446, 448, 701-702, 705-706; Gov. Exs. 14, 22-A, 22-B, R. 447, 700.) The telegram also stated that, if service in a local jail was agreed upon, Davis’ trial attorney should be notified thereof. (*Id.*) No action was taken thereon at that time, because Davis was out on bail pending an appeal from his conviction. (R. 446, 448.) On August 11, 1950, while Davis was still on bail, appellant Carrigan had been appointed U.S. Marshal for the Northern District of California, succeeding Roseen, who had reverted to his former status of chief deputy marshal. (R. 147-148, 444, 448.)

John Church,⁵ a general manager of Davis’ automobile agency, testified that, shortly prior to January 27, 1951, appellant Calmes, a deputy marshal in Carrigan’s office,⁶ visited the agency on several occasions

⁵Church, like Davis, was also named in the indictment as to appellants’ co-conspirator, but was not indicted with them. He was the first witness for the Government. (R. 19-227.) His testimony, with respect to each of his several conversations with appellants, was specifically limited to the particular appellant who had engaged therein. (R. 21, 22, 24, 741-742.) However, at the conclusion of Church’s testimony, the trial Court ruled that his testimony was sufficient to establish, *prima facie*, the conspiracy charged, and consequently, the testimony of all appellants. (R. 230.)

⁶Calmes was acquainted with Church and Davis, having met them about two years previously at a marshal’s automobile auction. (R. 19, 229, 260.) In 1949, Calmes had taken Davis into custody on charges arising from the Lake Tahoe accident. (R. 229, 261-262.) Subsequently, he purchased from Davis a new Chrysler, which he later customarily brought to Davis’ place for servicing. (R. 20, 29, 229, 261.)

for the purpose of arranging a meeting between Davis and Carrigan, who had been interested in purchasing a new automobile. (R. 19, 20-22.) Davis testified that on one such occasion, Calmes suggested that Davis make a "deal" with Carrigan for a new Chrysler, stating that Carrigan was "all powerful" and "would be a fine connection" for Davis in view of his prospective incarceration. (R. 229-230, 231, 263.) Calmes told Davis that Carrigan could arrange for him to serve his sentence at Fairfield (the Solano County jail), where he would be able to enjoy unusual privileges since Carrigan knew its warden. (232, 302-303, 307-308, 464.) In reply to Davis' statement, that his attorney had already obtained approval from Bennett, the Director of Prisons, for his confinement at San Bruno (the San Francisco County jail), Calmes stated that, "regardless of Mr. Bennett, Mr. Carrigan will have sole charge of you and full power over you once you are remanded to his custody", adding that Carrigan could do him "as much harm" as "good". (R. 231-232, 263-264, 309, 464.) Calmes also told him that there were some "very bad places" to which he could be sent, mentioning, specifically, San Francisco jail, Leavenworth and McNeil Island. (R. 308.)

On January 27, 1951, in accordance with arrangements made by Calmes, Carrigan and Calmes visited the agency to discuss an automobile transaction with Davis, but, Davis having left town before Carrigan arrived, they discussed the matter with Church instead. (R. 23-24, 233-234, 258-260.) Carrigan, after being offered by Church a \$1,150 "trade-in" allow-

ance on his 1947 Pontiac, replied, "No, you will never make a deal that way". (R. 24-25.) He followed by asking, "Well, does Mr. Davis expect to make a profit in this deal?" (R. 26.) After selecting a new Chrysler, having a list price of \$3,025, Carrigan stated to Church, "I guess Mr. Davis understands that after he is arrested I will have full charge over his custody", adding, "I think Phil Davis ought to make me a straight across the board deal, trade car for car. After all, \$1,500 or \$2,000 doesn't mean anything to Mr. Davis". (R. 26-27.) After Carrigan had left, and prior to making his own departure, Calmes advised Church, "I think it will be worth Phil Davis' while to make that deal with Carrigan". (R. 27.) Upon learning of Carrigan's proposition, Davis became fearful lest he experience physical mistreatment in the event of his incarceration under the Lake Tahoe sentence, if he did not accede to the proposition. (R. 28, 280, 305-306.)

Several days later, Davis met appellant Reynolds,⁷ who, posing as "a very close friend" of Carrigan, offered Davis a "deal", which he said was possible through Carrigan's intercession. (R. 237-238, 406-408, 418.) Davis "agreed to go along with that deal", which consisted of his paying \$200 per month in consideration of his imprisonment at Fairfield, where he would be allowed a telephone, unlimited visits, and the privilege to do his own cooking. (R. 238-239, 418.)

⁷Reynolds had been interested in Alameda County politics, to which Davis, on occasion, made financial contributions through Reynolds. (R. 318, 353-354.)

At the conclusion of this agreement, Reynolds told him that he was “making a wise move because where the marshal could help” him, “he could also hurt” him “just as much”. (R. 239.) He again met Reynolds, a few days later, to reaffirm the agreement. (R. 240.)

About mid-February, 1951, although the Supreme Court had not yet ruled on Davis’ petition for certiorari, Reynolds told him that he had news from Washington that Davis’ petition would be denied and that he would have to commence service of his sentence in a few days. (R. 240-241, 419, 105.) Reynolds also told him that Carrigan had decided that Davis serve his sentence at Santa Rita Rehabilitation Center, a prison-farm branch of the Alameda County jail at Oakland, rather than Fairfield. (R. 241, 512.) He assured Davis that “Carrigan had very good connections” there, and that Reynolds could also help him since he was a personal friend of the sheriff in charge of that institution. (R. 242, 389-390.)* At that meeting, Reynolds also told Davis that he would notify him concerning the details and the date for his surrender to the marshal. (*Id.*)

Davis’ petition for a writ of certiorari was denied on February 26, 1951. (R. 105.) On March 5, 1951, after being apprised by Reynolds that he would be required to surrender two days later at a time and

*The sheriff testified that, about two weeks prior to March 7, 1951, Reynolds had called him, stating that he thought Davis would be taken to Santa Rita and had tried to arrange for special privileges for Davis, such as a telephone and unrestricted visits from Davis’ business manager. (R. 653, 654-655, 661-662.) Davis had never asked Reynolds to speak to the sheriff on his behalf. (R. 278.)

place convenient for him, Davis advised Reynolds that he would surrender at 2:00 p. m. on March 7, at a certain street intersection within several blocks from his place of business. (R. 242-243.) Although Davis had no official information from any source, and had not communicated with the marshal's office concerning his surrender rendezvous, he was taken into custody by Calmes at the appointed time and place and delivered directly to Santa Rita. (R. 30, 243-245.) He was allowed to surrender on a street corner in order to avoid newspaper photographers and reporters, who had caused him adverse publicity since the Lake Tahoe incident. (R. 485.)⁹

On March 11, 1951, when Church first visited Davis at Santa Rita, Davis instructed him to cancel Davis'

⁹In the latter part of February 1951, Roseen had shown Carrigan Bennett's telegram and conferred with him concerning a place for Davis' confinement. (R. 448-449, 486, 489, 490.) Carrigan, after further discussing the matter with the U.S. Attorney, told Roseen that he thought he had sufficient authority to act thereon. (R. 449-450.) The authority contained in the telegram had never been revoked. (R. 456.)

According to the Marshal's Manual, the standing instructions for Carrigan's office were to commit federal prisoners required to serve sentences of less than three months for convictions of misdemeanors to the nearest approved jail; and those required to serve three months or more to McNeil Island Prison Camp, unless special authority for local incarceration had been granted, as in Davis' case. (R. 461-463, 514, 733; Gov. Exs. 15, 16, R. 475.) Fairfield and San Bruno were the local jails ordinarily used by Carrigan's office. (R. 464.) Alameda County jail, although accredited, was not utilized because of its inconvenient location. (*Id.*) Santa Rita, prior to Davis' commitment there, never had any male prisoners, although it was not necessarily restricted to female inmates. (R. 457, 660.) Roseen testified that he understood that Davis was to be placed in the Alameda County jail. (R. 458, 494.) He did not know that Davis had been taken to Santa Rita until a sheriff from that institution had called him to inquire why Davis had not been processed through the main branch. (R. 458, 483, 494-495.) It seems that Davis was taken directly to Santa Rita to avoid publicity. (R. 330.)

agreement with Reynolds because he was not receiving any "special benefits" as had been promised. (R. 321-323.)

On March 16, 1951, Reynolds visited Davis at Santa Rita and told him that "Carrigan was very angry because he had received no money," and that Davis would be on the "train leaving for McNeil Island Penitentiary the following Wednesday," if Carrigan was not paid \$500 "immediately." (R. 245-246; Gov. Ex. 2, R. 34-35, 99-100.)¹⁰ A few days later, on instructions from Davis, Church forwarded \$500 in cash to Reynolds. (R. 39-40, 50-52, 246-247; Gov. Exs. 3-A, 3-B, R. 52.) However, on March 26, 1951, Reynolds returned the money, upon Church's request, after Davis had declined to accede to Reynolds' demands for the payment of an additional sum of \$500. (R. 46-50, 52, 189.) At the same time, Church threatened Reynolds that, if any attempt was made to move Davis from Santa Rita, he would notify "the proper authorities" of the facts surrounding Davis' incar-

¹⁰Before Carrigan made a trip to Washington on March 19, 1951, Roseen had asked him to check with Bennett, the Director of the Bureau of Prisons, as to the propriety of Davis' imprisonment in Santa Rita. (R. 468, 499.) Roseen had felt that, in view of the date of the telegram and the absence, on March 7, of the reason given therein for local imprisonment of Davis, his civil suit having been settled prior to that date, the marshal should have had further approval of the action taken. (R. 498.) Upon his return on March 22, Carrigan told Roseen that their action had the approval of Mr. Bennett (R. 469, 499, 500.) However, Mr. Bennett testified that Carrigan had never discussed the Davis case with him, save to remark that he was having some trouble with a prisoner, in an Oakland jail, who had been demanding special privileges, in response to which Bennett had advised the marshal to transfer the prisoner, lest he suffer embarrassment. (R. 709-712.)

ceration. (R. 50-51, 196-201, 205-207.)¹¹ In reply, Reynolds told him that orders for Davis' transfer had already been issued the day before. (R. 51.) On March 27, 1952, Church, in a telephone conversation, told Reynolds that Davis felt he was being "badly abused," to which Reynolds replied that as far as he was concerned he was "through" with Davis. (R. 56.)

On March 30, 1951, a deputy marshal, on Carrigan's orders, instructed the sheriff's office at Santa Rita to have Davis prepared for transfer to McNeil Island within three days. (R. 516-519, 526, 529-531, 538.) Carrigan told the deputy to have the sheriff inform "Davis that if he has any business to transact he had better do it soon." (R. 530.) Accordingly, that day, the sheriff alerted Davis for transfer. (R. 656, 658.) Actually, no orders had been issued for Davis' transfer to McNeil Island. (R. 210, 469.) Although the marshal had discretionary power to transfer Davis, for reasons of his welfare, from Santa Rita to another local jail, he had no such power, without special authorization from the Director of the Bureau of Prisons, to transfer him to McNeil Island Prison Camp under any circumstances. (R. 480-481, 515.)

On April 5, 1951, Church, pursuant to instructions from the F.B.I., telephoned Calmes to inquire concerning reports of Davis' transfer to McNeil Island. (R. 57, 73-74, 111.) The following day Calmes confirmed

¹¹Later that day, Davis and Church gave statements to the F.B.I. concerning the demands for money made upon Davis. (R. 92, 170, 197, 250, 251, 253, 286; Gov. Exs. 7-11, R. 122, 443, 444.)

those reports and accused Church of circulating rumors that Carrigan had been taking bribes. (R. 58-59.)

On April 10, 1951, Calmes appeared at Santa Rita armed with a mandate for Davis' removal to Fairfield. (R. 247, 475, 540, 543-544; Gov. Exs. 17-20, R. 471, 543-545.) He told Davis that Carrigan desired some of the bribe money which it had been rumored Davis was paying, or, in lieu thereof, a new car in exchange for his used car, and that, in addition, Carrigan wanted Calmes to be paid \$500. (R. 248-249, 325, 334, 336-337.) Calmes also told Davis that he had dissuaded Carrigan from ordering Davis' removal to McNeil Island Penitentiary and obtained the transfer to Fairfield. (R. 249, 333.) Davis remonstrated with Calmes about his removal and promised to pay the money previously requested by Reynolds if he were permitted to remain at Santa Rita unmolested. (R. 249, 338-339.) Calmes stated that he had to check the matter with Carrigan. (R. 249-250, 338-339.) Having done so, he left without executing the transfer orders. (R. 65, 249-250, 546, 338-339, 438-442, 475; Gov. Exs. 12-13, R. 439, 442.)¹²

¹²On April 9, Carrigan informed Roseen of verbal reports that Davis was unable to "get along" at Santa Rita and suggested his transfer. (R. 471, 472-474.) Roseen concurred in the suggestion in consideration of Davis' welfare, and the following day prepared the necessary orders, which were signed by Carrigan, for Davis' transfer to Solano County jail (Fairfield). (R. 470-472, 473-474, 503-504; Gov. Ex. 17, R. 471.) A day later, Carrigan told Roseen that the orders were not executed and were to be canceled, because Davis had "made his peace" and did not desire to leave Santa Rita. (R. 474, 506-507.)

On April 11, 1951, Calmes reported to Church that it had been determined that Davis pay the marshal's office \$2,000. (R. 65-66.) On April 12, 1951, pursuant to instructions from the F.B.I., Church reported to Calmes that Davis had authorized the payment of that amount, on condition that the money be delivered by Church to Carrigan personally. (R. 67, 73-74.) Later that day, Carrigan called and arranged with Church to personally receive payment from Church. (R. 68.) On that day, Carrigan was arrested by agents of the F.B.I., after Church had handed him \$2,000, at the appointed time and place outside the Federal Building in San Francisco. (R. 71-73, 555-557, 559, 562, 581-583, 595-598, 615-619; Gov. Exs. 6, 6-A, 21, R. 563, 562, 564-565, 614.)¹³

¹³In handing the money to Carrigan, Church exhorted him to promise that he would not make additional demands for money, to which Carrigan replied, "I don't operate that way." (R. 119.) Immediately upon apprehension, Carrigan made several statements, which had been admitted in evidence only as against him. (R. 566.) To two of the arresting officers, Carrigan remarked, "Yes, yes, I have been expecting you." (R. 558, 583.) When asked to surrender the money, he stated, "You can't have that, that is evidence." (R. 584, 598.) On the way to the F.B.I. office, he remarked, "Well, I guess I made one mistake, I should have called Kimball," the Special Agent in Charge of the San Francisco office of the F.B.I. (R. 584-585, 595-596, 598-599.) When informed that Kimball was one of the arresting agents, Carrigan told him, "You will find a message waiting for you from me at your office." (R. 599, 585.) Kimball's office staff testified that no calls or messages from Carrigan had come in that day. (R. 599-600, 621-626, 631, 632, 634-636, 637-639, 640-646, 648-650.)

Later that day, upon being interviewed by newspaper reporters, Carrigan explained that he knew that Davis was paying bribes and that Carrigan had taken the money as part of his investigation on authority from the Director of the Bureau of Prisons, who had requested him to personally uncover the guilty persons. (R. 664-667, 680-682, 689-693.) Testimony concerning these statements was limited to Carrigan. (R. 665.) Bennett testified that he had never

ARGUMENT.

I.

THE EVIDENCE IS AMPLY SUFFICIENT TO SUSTAIN THE JURY'S FINDING THAT THERE WAS A SINGLE, GENERAL CONSPIRACY IN WHICH ALL APPELLANTS PARTICIPATED.

The principal question presented herein is the sufficiency of the evidence to support the jury's finding that all the appellants had engaged in a single conspiracy to deprive the United States of its right to the faithful and lawful services of one of its marshals. Appellants severally contend, on the basis of *Kotteakos v. United States*, 328 U.S. 750, and *Canella v. United States*, 157 F. (2d) 470 (C.A. 9), that there was prejudicial variance between the proof and the indictment because the indictment charged a single general conspiracy and the evidence, according to them, tends to prove several independent, though similar, conspiracies.¹⁴ Their contentions are clearly without merit.

We submit that there is an abundance of evidence, as outlined in the Statement of Facts, *supra*, from which the jury could have concluded that there was but one continuous and persistent conspiracy to defraud the Government. The indictment charges but one conspiracy, with five specified overt acts, in a

discussed with Carrigan the Davis case or any alleged bribery connected therewith, nor had he ever authorized Carrigan to conduct any investigation. (R. 711-712.)

¹⁴Carrigan (Br. 17-26); Calmes (Br. 17-24). Reynolds (Br. 23-36), however, goes further in his contention. He claims that the evidence not only fails to prove a general conspiracy, but also that there is no competent evidence to show his participation in any of the isolated conspiracies, which, according to him, the evidence proves.

single count, and the trial judge submitted the case to the jury on the basis of a single conspiracy. His specific instructions in this respect were:

In considering the charge of conspiracy contained in the indictment I instruct you that the defendants are not on trial for doing any of the overt acts alleged in the indictment. They are only on trial for unlawfully conspiring together. Unless you find to a moral certainty and beyond a reasonable doubt that the defendants did so conspire together, as charged in the indictment, you must return a verdict finding the defendants not guilty even though you should also find that one or more of the defendants did one or more of the overt acts set forth in the indictment.

* * * * *

An indictment charging a specified crime cannot be supported or proved by proof of a different crime. If you find that two or more of the defendants entered into some conspiracy somewhere at some time but that they did not enter into the conspiracy charged in the indictment then you must acquit them of the conspiracy charged in the indictment.

The jury, therefore, must have concluded that the evidence did establish a single conspiracy.

Appellants do not deny that in examining the record this Court must consider the evidence in the light most favorable to the Government, giving it the benefit of all inferences which reasonably may be drawn therefrom. See *Taylor v. Mississippi*, 319 U.S. 583, 585-586; *Craig v. United States*, 81 F. (2d) 816,

827 (C.A. 9), certiorari denied, 298 U.S. 690; *Curley v. United States*, 160 F. (2d) 229 (C.A.D.C.), certiorari denied, 331 U.S. 837. The evidence clearly shows that on January 27, 1951, under color of his office as U. S. Marshal, Carrigan, aided and abetted by Calmes, had attempted to intimidate Davis, a potential federal prisoner, into giving him a new Chrysler in exchange for his used Pontiac, under threat of official reprisal. Thus, from the evidence, properly limited as against Carrigan and Calmes, showing the various circumstances surrounding the January 27 episode alone, the jury could have properly inferred that, on or about that day, Carrigan and Calmes had entered upon a joint scheme, based upon a violation of the public trust reposed in them and the concomitant impairment of the lawful functions of an agency of the United States, to extort something of value from Davis. Cf. *Green v. United States*, 28 F. (2d) 965 (C.A. 8); *United States v. Furer*, 47 F.Supp. 402 (S.D. Cal.). Their acts, done in pursuance of an apparent criminal purpose, certainly permitted an inference of at least a tacit understanding between them. *Marino v. United States*, 91 F. (2d) 691 (C.A. 9), certiorari denied, 302 U.S. 764. Indeed, it has been consistently held that the existence of a conspiracy may be inferred from acts done in pursuance of an apparent criminal intent, and the mere fact that a conspiracy has been inferred from circumstantial evidence does not render such evidence insufficient. *Blumenthal v. United States*, 332 U.S. 539, 549; *Stillman v. United States*, 177 F. (2d) 607, 615 (C.A. 9); *Rose*

v. United States, 149 F. (2d) 755, 759 (C.A. 9). As the Supreme Court pointed out in *Direct Sales Co. v. United States*, 139 U.S. 703, 714, proof of conspiracy "by the very nature of the crime, must be circumstantial and therefore inferential to an extent varying with the conditions under which the crime may be committed." The fact that the January 27 incident was also specified as one of the overt acts, did not render it incompetent as evidence proving the conspiracy. *American Tobacco Co. v. United States*, 328 U.S. 781, 789; *United States v. Holt*, 108 F. (2d) 365, 368-369 (C.A. 7), certiorari denied, 309 U.S. 672.

The jury, having found the existence of the conspiracy between Carrigan and Calmes, was justified in further finding that the conspiracy did not terminate with the visit to Davis' agency on January 27. It could have concluded from all the evidence before it that the agreement between the marshal and his deputy was to pursue their plan until it reached maximum fruition.¹⁵ Difficulty experienced in accomplishing the object of the conspiracy is not conclusive of the termination of the agreement to act in concert. *United States v. Rollnick*, 91 F. (2d) 911, 918 (C.A. 2). It is evident from their acts that Carrigan and Calmes did not intend to abandon their undertaking after their fruitless encounter with Church on January 27. Their apparent design had been to make

¹⁵Such an inference is possible from the statement, "I don't operate that way," made by Carrigan in reply to Church's exhortation that he promise not to make additional demands for money, after being paid \$2,000 on April 12.

a "deal" with Davis, whom they failed to meet on that day. They still desired to approach Davis, or, at least, to have Church communicate their proposition to him for his personal consideration. This clearly appears from the advice, "I think it will be worth Phil Davis' while to make that deal with Carrigan," which Calmes gave to Church upon making his departure. Thus, the purpose of the conspiracy being a continuing one, the conspiracy itself must have been of the same nature. Indeed, once a conspiracy is established, it may properly be inferred to continue until consummation of its purpose or until its abandonment. *United States v. Kissel*, 218 U.S. 601; *Marino v. United States*, 91 F. (2d) 691 (C.A. 9), certiorari denied, 302 U.S. 764; *Nyquist v. United States*, 2 F. (2d) 504 (C.A. 6), certiorari denied, 267 U.S. 606.

With the conspiracy so continuing, the jury could have found that, several days later, it had entered its second phase with Carrigan's enlistment of appellant Reynolds into the conspiracy in his determined effort to make a "deal" with Davis through Reynold's intervention. The evidence shows that Reynolds, posing as "a very close friend" of Carrigan, had offered to obtain, through Carrigan, some prison privileges for Davis for \$200 a month. It further shows that Reynolds had complimented Davis on his "wise move" in acceding to his proposition, observing that the marshal could hurt him as much as he could help. Thus, the evidence warrants an inference that Reynolds also became a member of the conspiracy

with Carrigan and Calmes to obtain a bribe from Davis. That inference as to Reynolds' part in the conspiracy becomes stronger, in fact almost inescapable, from the evidence of his subsequent meetings and conversations with Davis. He not only informed Davis in advance that Santa Rita was to be his place of confinement, but he alone arranged the details as to time and place for Davis' surrender at a time when Davis was incommunicado and had no official information concerning his surrender from any other source. Calmes took Davis into custody strictly in accordance with the arrangements made by Davis with Reynolds. This clearly points to a close liaison between Reynolds and Carrigan's office.

Further evidence also supports the permissible inference implicating Reynolds in the conspiracy. It shows that, within ten days following Davis' imprisonment, Reynolds visited him at Santa Rita to tell him that "Carrigan was very angry because he had received no money," and that he would be transferred to McNeil Island Penitentiary, if Carrigan was not paid \$500 "immediately." This inaugurated a third phase of the same conspiracy to accomplish the same object of extorting money from Davis, this time by playing upon his fear of being transferred to a dangerous place. On March 26, 1951, following Davis' refusal to accede to Reynolds' demands for an additional sum of \$500, Reynolds returned, at Church's request, the \$500 previously paid him, telling Church that he was "through" with Davis. Reynolds' unusual familiarity with activities of Carrigan's office

is evidenced by the fact that on March 26 he told Church that Carrigan had already prepared orders for Davis' transfer to McNeil Island. The fact is that, on March 30, Carrigan directed the sheriff at Santa Rita to prepare Davis for a transfer to McNeil Island.

Thus, there is an abundance of evidence directly relating to Reynolds to warrant the conclusion that he had joined and actively participated in the conspiracy originally hatched between Carrigan and Calmes to get money from Davis. Proof of his participation in the conspiracy rests, not upon admissions and declarations, as he contends (Br. 28), but upon direct evidence concerning his own acts. Evidence of his meetings and conversations with Church and Davis tended directly to prove facts of his particular dealings and relations with them. His conversations with them were not in the nature of confessions or declarations; they were overt acts. The rule is that participation in a conspiracy may not be proved by the declarations of a co-conspirator. Thus, a statement by A to C that B is a member of a conspiracy would not be enough to establish B's membership. But there is no rule of law which prohibits A's testimony on the witness stand as to what B actually did from being considered to establish B's participation.

Overt acts may be considered in determining whether a conspiracy existed. *United States v. Holt*, 108 F. (2d) 365, 368-369 (C.A. 7), certiorari denied,

309 U.S. 672; see also *American Tobacco Co. v. United States*, 328 U.S. 781, 789. Reynolds' statements to Davis and Church were acts from which the fact of such a conspiracy, and his participation therein, could be inferred. See *Glasser v. United States*, 315 U.S. 60, 80; *United States v. Holt*, 108 F. (2d) 365 (C.A. 7), certiorari denied, 309 U.S. 672. Indeed, "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser v. United States*, *supra*. Once a continuing conspiracy between Corrigan and Calmes had been established, slight evidence would have been sufficient to connect Reynolds therewith. *Phelps v. United States*, 160 F. (2d) 858, 867-868 (C.A. 8), certiorari denied, 334 U.S. 860; *Meyers v. United States*, 94 F. (2d) 433, 434 (C.A. 6), certiorari denied, 304 U.S. 583. Here, the evidence, showing a pattern of action on the part of Reynolds, completely dovetailing the pattern set in motion by Carrigan and Calmes, was more than sufficient to show concert of action.

It was a question of fact for the jury, as the trial Court properly instructed it, to determine whether or not Reynolds had affirmatively disassociated himself from the conspiracy on March 26, 1951. However, in view of his active participation in the conspiracy up to that time, the fact of such disassociation would have no effect on his responsibility, arising from the extent of his participation therein.

On March 26, 1951, the conspiracy entered into its fourth and final phase, although Church and Davis had withdrawn themselves from it on that date by notifying the F.B.I. During this period Calmes demanded that Davis pay \$2,000 to Carrigan, and Carrigan, in accordance with his own arrangements with Church, received payment of the money on April 12, 1951, at which time he was arrested by the F.B.I.

Thus, the jury had before it substantial evidence from which, in the exercise of its right to draw proper inferences, it could reasonably conclude that there was a single persistent conspiracy to defraud the Government by extorting money from Davis, which continued from the initial demands on Davis to the time of Carrigan's arrest. Carrigan and Calmes were at all times members of this conspiracy and Reynolds, although he may have joined later and left earlier, did actively participate therein. Reynolds seems to be under the erroneous impression that in order to find him guilty of the conspiracy charged, it was necessary to prove that all appellants had entered into the conspiracy simultaneously on January 27 and together continued therein until April 12. That, however, is not the law. Once a conspiracy has been formed, the addition of a new member does not change the status of the original conspirators or create a new conspiracy. The new member, not only becomes responsible for all succeeding acts of the conspiracy, but adopts all of the preceding acts which the original conspirators performed in furtherance thereof. *Nor-*

ton v. United States, 295 Fed. 136 (C.A. 5); *Bryant v. United States*, 257 Fed. 378 (C.A. 5).

Appellants' contentions that the evidence proves a series of isolated conspiracies is in reality an attempt to have this Court credit their own testimony, which the jury, by its verdict, did not credit. Thus, Carrigan and Calmes each contend that their visit on January 27 to the Davis agency was in pursuit of a lawful business transaction, which ended then and there without a meeting of the minds; but if the jury did not believe the initial visit was for a lawful purpose, appellants' contention that the visit was a separate, isolated occurrence, loses its force. Calmes further contends that his activities between April 5 and April 12 were solely in his official capacity as a deputy marshal acting under orders of Carrigan. The fact that he was Carrigan's subordinate would not, however, preclude the formation of a conspiracy between them. Cf. *Hyde v. United States*, 225 U.S. 347, 368. Carrigan contends (Br. 14) that his "avowed purpose" in accepting the \$2,000 from Church was "To bring out into the open some one, unknown, or one or more unknown people who apparently were putting pressure on either Davis or Church, or both, with direct threats of doing something to Davis." It is difficult, indeed, to visualize how the receipt by a law enforcement officer of payment from an alleged extortion victim would lead to the apprehension of the extortionist, and the jury obviously did not credit such testimony.

Reynolds insists (Br. 29) that his relations with Church and Davis between February and March 26, 1951, "had reference to a plan whereby a representative was to go to Washington on behalf of Davis, at an expense of \$1,000, and there present to the Director of Prisons in person a proper application and showing and obtain from the Director of Prisons authorization for imprisonment of Davis in a local jail." It is similarly difficult to perceive the reason why Davis would desire to pay someone to intercede on his behalf to Washington for authority for local imprisonment during March 1951, when his attorney had already obtained such authority in November 1949. The jury quite naturally rejected this version. It is the function of the jury, and not of an Appellate Court, to draw inferences from the evidence. The verdict, if supported by evidence from which inferences may reasonably be drawn to establish guilt beyond a reasonable doubt, will not be disturbed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation for his conduct. *Glasser v. United States*, 315 U.S. 60, 80; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 254; *Gorin v. United States*, 312 U.S. 19, 32. Particularly, as Justice Douglas put it in *Nye & Nissen v. United States*, 336 U.S. 613, 617, an Appellate Court "could not reverse them if that theory taxed their credulity."

The jury was required, in order to convict, to find a single conspiracy. They had before them evidence that all three appellants had participated in a con-

certed effort to obtain money from Davis. Although each of them did not participate in all of the four approaches utilized to attain the common objective, yet the evidence is sufficient to connect them with one another and with the ultimate objective. The verdict is thus amply supported by the evidence.

II.

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN ITS INSTRUCTIONS TO THE JURY.

At the close of the charge to the jury, appellants severally entered their objections (R. 1499-1501), and now assign as error an excerpt from a portion of the charge, which in full context appears as follows (R. 1484-1485):

The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, you would be justified in the conclusion that such persons were engaged in a conspiracy. Nor is it necessary to prove that the conspiracy originated with all of the defendants, or that they all met during the process of its con-

coction; for every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties before or afterward, in furtherance of the common design. *Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.*

If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconceived plan and purpose, that is sufficient to permit you to infer that the illegal agreement charged was in fact entered into. [Emphasis supplied.]

Appellants severally contend, in effect, that the italicized portion of the charge¹⁶ is objectionable because it authorized their conviction of a general conspiracy on evidence which the jury could have found proved several independent conspiracies. Consequently, they claim that, under the rulings in *Kottekos v. United States*, 328 U.S. 750, and *Canella v. United States*, 157 F. (2d) 470 (C.A. 9), such alleged error requires a reversal of the judgments of conviction. We submit that the contentions are totally devoid of merit. Not only the quoted part of the charge

¹⁶Carrigan (Br. 26-27); Calmes (Br. 24-25); and Reynolds (Br. 36-39), who, in addition to the italicized excerpt, ascribes error to the second and third sentences of the above quoted portion of the charge.

but the italicized portion thereof correctly summarizes the established law on the subject relating to the proving of conspiracies by circumstantial evidence. *Blumenthal v. United States*, 332 U.S. 539; *United States v. Randall*, 164 F. (2d) 284 (C.A. 7), certiorari denied, 333 U.S. 856; *Phelps v. United States*, 160 F. (2d) 858 (C.A. 8), certiorari denied *sub nom. Peters v. United States*, 334 U.S. 860; *United States v. Potash*, 118 F. (2d) 54 (C.A. 2), certiorari denied, 313 U.S. 584; *United States v. Holt*, 108 F. (2d) 365 (C.A. 7), certiorari denied, 309 U.S. 672; see also: *American Tobacco Co. v. United States*, 147 F. (2d) 93 (C.A. 6), affirmed, 328 U.S. 781; *Lefco v. United States*, 74 F. (2d) 66 (C.A. 3).

There is nothing in the portion of the charge to which objection is made to warrant an inference, as appellants contend, that concerted action is not a requisite element in the crime of conspiracy. On the contrary, the trial Court in a rather lucid way said just that in the portion in which Reynolds alone finds objection, when it stated, "If it be proved that the defendants pursued by their acts the same object, often by the same means, *one performing one part and another another part of the same so as to complete it, with a view to the attachment of that same object*, you would be justified in the conclusion that such persons were engaged in a conspiracy." (Emphasis supplied.) Indeed, the portion of the charge to which all appellants object specifically refers to the preceding portion just quoted, which it summarizes.

Furthermore, there is nothing in the entire charge from which it may fairly be inferred that the jury was instructed to find appellants guilty on evidence other than that showing the single conspiracy charged. On the contrary, the following portions of the charge were calculated so that there would be no misunderstanding in this respect:

Each defendant in this case is individually entitled to, and must receive, your determination whether or not he was a member of the alleged conspiracy, if any existed, and as to each defendant you must determine whether or not he was a conspirator, as alleged, by deciding whether or not he wilfully, intentionally and knowingly joined with any other or others in an agreement or understanding having the elements of a criminal conspiracy as I have stated them to you. If you have a reasonable doubt as to any of these essential elements as to a defendant you should find him not guilty. (R. 1488.)

* * * * *

An indictment charging a specified crime cannot be supported or proved by proof of a different crime. If you find that two or more of the defendants entered into some conspiracy somewhere at some time but that they did not enter into the conspiracy charged in the indictment then you must acquit them of the conspiracy charged in the indictment. (R. 1490.)

Finally, there is no basis to appellant Reynolds' allegations of error (Br. 38) with respect to the portion of the charge relating to overt acts. It correctly states the law. *Braverman v. United States*, 317 U.S.

49; *United States v. Holte*, 236 U.S. 140, 144; *United States v. Johnson*, 165 F. (2d) 42 (C.A. 3), certiorari denied, 332 U.S. 852; *Holmes v. United States*, 134 F. (2d) 125 (C.A. 8), certiorari denied, 319 U.S. 776. Reynolds could not have been prejudiced thereby, especially in view of the following portion of the charge, which shortly preceded that portion to which he objects (R. 1488):

In considering the charge of conspiracy contained in the indictment I instruct you that the defendants are not on trial for doing any of the overt acts alleged in the indictment. They are only on trial for unlawfully conspiring together. Unless you find to a moral certainty and beyond a reasonable doubt that the defendants did so conspire together, as charged in the indictment, you must return a verdict finding the defendants not guilty even though you should also find that one or more of the defendants did one or more of the overt acts set forth in the indictment.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANTS' SEVERAL MOTIONS FOR A NEW TRIAL.

As shown in points I and II, *supra*, the judgments of conviction against the appellants are based upon substantial evidence, and correct instructions to the jury. Thus, the trial Court did not abuse its discretion in denying appellants' several motions for a new trial.

CONCLUSION.

Wherefore, the Government respectfully submits that the judgments of conviction against the several appellants be affirmed.

Dated, San Francisco, California,
April 18, 1952.

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No. 13,118

IN THE

United States Court of Appeals
For the Ninth Circuit

CECIL LEE DAVIDSON, also known as
Jack Reynolds,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 13,118

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CECIL LEE DAVIDSON, also known as
Jack Reynolds,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

FOREWORD.

This reply brief adheres to the main subdivision headings under which the arguments were presented in the opening brief.

1. **THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

It affirmatively appears from the record that appellant Reynolds had no contact with Church earlier than March 23 or 24, 1951. RT 42-43. In attempting to connect appellant Reynolds with the general conspiracy alleged in the indictment as continuing from

January 27, 1951, to April 12, 1951, the appellee therefore found it necessary to rely upon testimony given by Davis.

It is undisputed that Davis was absent from the Davis automobile agency in Oakland when the automobile episode of January 27, 1951, occurred, and that whatever information he may have had respecting the occurrence was derived from Church. He immediately communicated with his attorneys and discussed the episode. RT 280-283. And according to his testimony they had previously advised him that arrangements had been made with the Director of Prisons, Washington, for his incarceration in the jail at San Bruno if he had to serve time. RT 265-269.

Davis first talked with appellant Reynolds respecting his case some time in February of 1951. This was before the Supreme Court had denied his petition for certiorari. It is certain on the present record that when that conversation occurred Davis had not joined any conspiracy, if one existed. And it is equally certain on the present record that neither the automobile episode nor the arrangement for place of incarceration was mentioned by Davis to appellant Reynolds at that conversation or at any other time or place. The conversation, as Davis has it, consisted in appellant saying he had a "deal" for Davis whereby for the payment of \$200 at the end of each month Davis could be placed in Fairfield, treated well, and possibly allowed a telephone, guests, and cooking, and Davis saying he would "go along with the deal". RT 238-239.

The state of the evidence therefore refutes a contention that in February of 1951 appellant Reynolds joined an existing conspiracy. And even if it be assumed, which appellant denies, that the "deal" reflected a conspiracy for an unlawful purpose, the applicable law here is that stated in *United States v. Andolschek*, 2 Cir. 1944, 142 F. 2d 503, at page 507:

"It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may have entered, with third persons. That is of course an error; the scope of the agreement actually made measured the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity, or even the number of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purpose as he understands them. Nevertheless he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them. Upon the new trial if it shall appear that Hershowitz in fact supposed that there was only a limited plan or scheme, and that it did not include inspectors of the 'Permissive Section', he will not be proved to have been party to the conspiracy laid in the indictment, and there will therefore be a variance."

And in *Canella v. United States*, 9 Cir. 1946, 157 F.2d 470, this court said, at page 476:

“The theory of the trial court here and of the trial court in the Kotteakos case, was that all the evidence relating to all the separate spokes in the wheel was admissible against McCormac and Wyckoff and was relevant to the charge of a single conspiracy because of the general rule that when one joins an existing conspiracy he ‘takes it over as it is’ and becomes liable for all that has gone before or may come later. However, ‘to bring that rule into operation it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they may be of the same general nature. The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in furtherance of a purpose common to him and them. Declarations . . . become competent only when they are uttered in order to accomplish the common purpose.’ ”

The record before the court makes it clear, however, that the “deal”, as Davis relates it, was not an unlawful one. He was convicted in Sacramento, the Director of Prisons had consented to his being imprisoned in a local jail, *and he would be automatically imprisoned in the Fairfield jail if he surrendered at Sacramento.* And if special privileges were permitted by the local authorities there, such as telephones, guests, and cooking, it is obvious that Davis would have to stand the cost thereof, and that an entailed cost of \$200 monthly would not be unreasonable. It

was not the understanding of Davis that this \$200 monthly was to go to a United States Marshal. RT 386-387.

According to Davis, the "deal" was changed, and he was ultimately imprisoned in an Alameda County jail. This was an accredited and approved jail for federal misdemeanor prisoners, but was not used "on account of convenience". RT 457, 464. Imprisonment in many federal misdemeanor cases was in an approved jail nearest to the place of surrender, and Davis surrendered in Alameda County. RT 462. Chief Deputy Marshal Roseen said that no federal prisoners had been sent there for a long time, but he immediately referred to a federal prisoner there a "short time before". RT 457, 483. Shortly after he arrived at this Alameda County jail Davis found out that "special benefits were not available and the whole thing was ridiculous", and he instructed Church to telephone this appellant and "tell him the matter was closed". RT 321-322.

From what has just been said it is plain, of course, that Davis had a side arrangement of some sort with this appellant which, whether called "deal" or "conspiracy", was wholly independent of the plots or schemes, if any, directed against Davis by defendants Carrigan and Calmes. Taking the Davis testimony at par, it therefore follows that it was inadequate, as a matter of law, to support the allegations of the indictment that this appellant was party to a general conspiracy that operated continuously from January 27, 1951, to April 12, 1951.

Moreover, and as pointed out at page 28 of the opening brief, the case against appellant cannot survive an application of the general rule that in conspiracy cases the *corpus delicti* cannot be proved by the admissions or declarations of a defendant. In support of that rule the cases of *Colt v. United States*, 5 Cir. 160 F. 2d 650, 651, *Tabor v. United States*, 4 Cir. 152 F. 2d 254, 257, *United States v. Di Orio*, 3 Cir. 150 F. 2d 938, 940, and *Ryan v. United States*, 8 Cir. 99 F. 2d 864, 869, were there cited. Those cases and the rule they reflect passed unchallenged in the brief for appellee. Appellant adds and quotes from *Tingle v. United States*, 8 Cir. 1930, 38 F. 2d 573, 575:

“But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the *corpus delicti* charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This statement requires no citation of authorities. It is equally true that ‘extrajudicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the *corpus delicti*.’ *Martin v. United States*, (C.C.A.) 264 F. 950. * * * Knowledge without some evidence of participation is not enough. Circumstances merely arousing suspicion of guilt are insufficient. * * * In such cases, when the circumstances relied upon are as consistent with innocence as with guilt, they are robbed of all probative value.”

It is true that the record discloses that there were meetings between Neider and appellant, Davis and appellant, and Church and appellant. The meetings between Neider and appellant need not be reviewed here. By judgment of acquittal at the end of the government's case the trial judge declared and later instructed the jury that Neider was not a conspirator. The testimony of Neider, given as a witness for appellant, showed the innocent character of their meetings and exonerated appellant from any wrongdoing. Of the meetings between Davis and appellant, and Church and appellant, it is appropriate to say in the language of the Supreme Court in *United States v. Di Re*, 332 U.S. 581, 594, 68 S.Ct. 222, 227, that "Presumptions of guilt are not lightly to be indulged from mere meetings", and that a conspiracy charge cannot be made out by piling inferences on inferences. (*Direct Sales Co. v. United States*, 319 U.S. 703, 63 S.Ct. 1265; *United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204.)

The record here is devoid of substantial independent evidence of the corpus delicti corroborative of the declarations and admissions ascribed to appellant by Davis and Church. Therefore, under the rule just stated, the conviction of appellant for conspiracy cannot be sustained.

The appellee concedes at page 24 of its brief that the general conspiracy alleged in the indictment as continuing until April 12, 1951, ended on March 26, 1951, so far as Davis and Church were concerned. On that date Davis ceased to be the victim of a conspiracy and became the bait to entrap defendants Carrigan and

Calmes. That date also marked the ending of any side arrangement between Davis and this appellant on behalf of Davis. And if it be assumed, which appellant denies, that appellant was party to any conspiracy, the record will not permit it to be doubted that March 26, 1951, also marked the ending thereof so far as appellant was concerned.

It is apparently the position of appellee, however, that by joining a conspiracy one becomes liable for all that has gone before or may come later. The position is too broad. Cases earlier cited reflect the qualifying rule as to what has gone before. And the rule is well established that if one abandons a conspiracy or withdraws from it he is absolved from liability for what may come later. (*Hyde v. United States*, 225 U.S. 347, 32 S.Ct. 793, 803; *Local 167 v. United States*, 291 U.S. 297, 54 S.Ct. 396, 398; *United States v. Graham*, 2 Cir. 1939, 102 F. 2d 436, 444; *United States v. Anderson*, 7 Cir. 1939, 101 F. 2d 325, 331; *Marino v. United States*, 9 Cir. 1937, 91 F. 2d 691, 696.)

This case is clearly governed by the cases of *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557, and *Canella v. United States*, 9 Cir., 157 F. 2d 470, cited at page 34 of the opening brief. Defendant Reynolds was convicted of the general conspiracy alleged in the indictment as continuing from January 27, 1951, to April 12, 1951. If a conspiracy existed on or before January 27, 1951, defendant Reynolds did not join it. If it continued thereafter, defendant Reynolds did not join it. If a conspiracy existed on March 26, 1951, defendant Reynolds did not

join it. If it continued thereafter, defendant Reynolds did not join it. If any side arrangement or "deal" between Davis and defendant Reynolds reflected a conspiracy, the other defendants did not join it and it ended on March 26, 1951. Clearly, the judgment against this appellant should be reversed for the reason that it is not supported by substantial evidence.

2. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT ERRONEOUS INSTRUCTIONS OPERATED TO HIS PREJUDICE.

In this reply brief it is enough to cite *Kotteakos v. United States*, 328 U.S. 750, 767-771, 66 S.Ct. 1239, 1248-1251, 90 L.Ed. 1557, which discusses the prejudice which must inevitably result when jury instructions addressed to a single, continuing conspiracy are given in a case where the evidence discloses several different conspiracies.

3. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT DENIAL OF HIS MOTION FOR NEW TRIAL WAS A MANIFEST ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT.

No occasion exists for supplementing what was said in the opening brief at pages 39 and 40.

CONCLUSION.

Appellant therefore again respectfully submits that the judgment against him should be reversed.

Dated, San Francisco,

May 28, 1952.

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No. 13,118

IN THE

United States Court of Appeals
For the Ninth Circuit

CECIL LEE DAVIDSON, also known as
Jack Reynolds,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING
AND
MOTION TO STAY MANDATE.

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No. 13,118

IN THE

United States Court of Appeals
For the Ninth Circuit

CECIL LEE DAVIDSON, also known as
Jack Reynolds,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable United States Court of Appeals for
the Ninth District:*

The appellant, Cecil Lee Davidson, also known as Jack Reynolds, respectfully petitions for a rehearing in the above entitled cause. The following grounds are urged:

1. The decision herein does not apply the rule that in conspiracy cases the corpus delicti cannot be proved by the admissions or declarations of a defendant, and in that respect the decision is not uniform with the decisions in other circuits.

2. The decision herein does not apply the rule that if one abandons a conspiracy or withdraws from it

he is absolved from liability for what comes after, and in that respect the decision is not uniform with the decisions of the Supreme Court, the decisions in other circuits, and previous decisions of this court.

3. The decision herein is not uniform with the decisions of the Supreme Court in *Kotteakos v. United States*, 328 U.S. 750, and the decision of this court in *Canella v. United States*, 157 F. 2d 470.

1. **THE DECISION HEREIN DOES NOT APPLY THE RULE THAT IN CONSPIRACY CASES THE CORPUS DELICTI CANNOT BE PROVED BY THE ADMISSIONS OR DECLARATIONS OF A DEFENDANT, AND IN THAT RESPECT THE DECISION IS NOT UNIFORM WITH THE DECISIONS IN OTHER CIRCUITS.**

The rule above stated is one of uniform application in other circuits. (*Colt v. United States*, 5 Cir. 160 F. 2d 650, 651; *Tabor v. United States*, 4 Cir. 152 F. 2d 254, 257; *United States v. Di Orio*, 3 Cir. 150 F. 2d 938, 940; *Ryan v. United States*, 8 Cir. 99 F. 2d 864, 869; *Tingle v. United States*, 8 Cir. 38 F. 2d 573, 575.)

The statement of the rule in *Tingle v. United States*, 8 Cir. 38 F. 2d 573, 575, is as follows:

“But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This

statement requires no citation of authorities. It is equally true that 'extrajudicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.' *Martin v. United States* (C.C.A.) 264 F. 950."

Your petitioner undertakes the demonstration that when the record before the court is subjected to the acid test of the foregoing rule, the judgment of conviction against him should not be permitted to stand.

The indictment charged petitioner with being party to a conspiracy that began on January 27, 1951, and continued until April 12, 1951. The opinion herein recognizes that the conspiracy was formed by defendant Carrigan, United States Marshal, and defendant Calmes, his deputy, with the objective of extracting money or property from Davis, a potential federal prisoner, through promises or threats. The opinion also recognizes that the first manifestation of the conspiracy was the episode of the proposed automobile trade on January 27, 1951. And the opinion further recognizes that the record is devoid of evidence that petitioner was party to any conspiracy at that time.

Proof legally sufficient in character and weight was therefore necessary to establish that somewhere along the line after January 27, 1951, petitioner knowingly joined the conspiracy with full knowledge of its purpose and that he accepted it and its implications. (*United States v. Andolschek*, 2 Cir. 1944, 142 F. 2d 503, 507.) An application of the rule above invoked

strips from the record the statements of Davis as to what petitioner told him and in the vacuum remaining the judgment of conviction against petitioner cannot possibly survive.

The opinion herein intimates that petitioner was brought into the Davis case following the episode of January 27, 1951, because petitioner was a close friend of Carrigan. That is based entirely on statements by Davis that petitioner said he was a close friend of Carrigan. The record refutes the intimation. Petitioner was brought into the Davis case long before Carrigan became marshal in August of 1950. Petitioner opposed Carrigan in his candidacy for that office and supported a rival candidate. RT 882. What the record shows is that petitioner was brought into the Davis case *in 1949* because he was a friend and business associate of Sam Neider who, in turn, was a very close friend and confidant of Davis. Following his conviction in 1949, Davis became dissatisfied with the attorney representing him and asked his friend Neider to recommend attorneys for handling an appeal to this court. Neider consulted petitioner and the attorneys recommended by petitioner were employed by Davis and handled his appeal and certiorari. RT 1047-1052, RT 1211-1213. When the statements of Davis are eliminated, as they must be eliminated under the rule here invoked, the proper conclusion from the record is that Carrigan and petitioner were not at all friendly.

The episode of January 27, 1951, made Davis apprehensive and he immediately consulted his attor-

neys. RT 363. He stated his attorneys had advised him that the Director of Prisons had approved incarceration in a local jail. RT 265-269. In the natural course of events if Davis surrendered in Alameda County he would be placed in the Santa Rita jail; if he surrendered at San Francisco he would be placed in the San Bruno jail; and if he surrendered at Sacramento, where he was convicted, he would be placed in the Fairfield jail. Any one consulting an attorney would be immediately advised to that effect. Apprehension also caused Davis to consult his friend Neider. Neider, in turn, consulted petitioner as an ally of Neider and Davis, not as an emissary from an enemy, and discussed incarceration of Davis in a local jail but did not mention the episode of January 27, 1951. RT 1222-1223, RT 1231-1232. The scope of petitioner's assistance to Davis was defined and arranged by Neider. In granting Neider's motion for judgment of acquittal the trial judge ruled that the evidence was insufficient to implicate Neider in a conspiracy. The same insufficiency of evidence should prompt this court to reverse the judgment of conviction against this petitioner. Apart from the statements of Davis as to what petitioner said there is no semblance of evidence in the record that petitioner was party to any "deal" involving marshal Carrigan.

The opinion herein also intimates that petitioner arranged for the surrender of Davis. Again the court accepts at par the statements of Davis as to what petitioner said. The record definitely shows that all

arrangements for the surrender of Davis were made by his attorneys. RT 1105, RT 1112-1115.

Another intimation in the opinion is that Davis, while imprisoned, was threatened by petitioner. Davis' attorneys visited him while he was in jail, and even Davis disavowed that petitioner threatened him. RT 273, RT 382-383.

If the rule above invoked be applied, and the statements of Davis as to what petitioner said eliminated, it is plain that there is no case against petitioner. Petitioner respectfully urges that a rehearing should be granted and the rule applied.

2. **THE DECISION HEREIN DOES NOT APPLY THE RULE THAT IF ONE ABANDONS A CONSPIRACY OR WITHDRAWS FROM IT HE IS ABSOLVED FROM LIABILITY FOR WHAT COMES AFTER, AND IN THAT RESPECT THE DECISION IS NOT UNIFORM WITH THE DECISIONS OF THE SUPREME COURT, THE DECISIONS IN OTHER CIRCUITS, AND PREVIOUS DECISIONS OF THIS COURT.**

The rule above stated is one that has been uniformly applied. From the many cases on the subject a few are cited. (*Hyde v. United States*, 225 U.S. 347, 32 S.Ct. 793, 803; *Local 167 v. United States*, 291 U.S. 297, 54 S.Ct. 396, 398; *United States v. Graham*, 2 Cir. 1939, 102 F. 2d 436, 444; *United States v. Anderson*, 7 Cir. 1939, 101 F. 2d 325, 331; *Marino v. United States*, 9 Cir. 1937, 91 F. 2d 691, 696.)

The opinion recognizes in effect that petitioner was absolved from liability for what came after March 26, 1951, when the FBI took over. After that date,

all the negotiations back and forth occurred which ultimately resulted in defendant Carrigan accepting \$2000 with the FBI looking on. Nowhere in the opinion, however, does the court consider the fact that at all events petitioner was absolved from liability for what came after March 26, 1951. Nowhere in the opinion does the court consider the legal consequences flowing from the fact that he was thus absolved. Nowhere in the opinion does the court consider and apply the rule above invoked. It is obvious that the acts and conduct of defendants Carrigan and Calmes after March 26, 1951, influenced the jury in finding petitioner guilty along with Carrigan and Calmes. It is obvious that the acts and conduct of defendants Carrigan and Calmes after March 26, 1951, influenced the trial judge in imposing sentence upon petitioner. And it is obvious that the present record will not permit it to be said that petitioner was an ally of defendants Carrigan and Calmes rather than an ally of Davis and Neider. Petitioner therefore respectfully urges that a rehearing should be granted in order that the rule above invoked may be considered and applied.

3. **THE DECISION HEREIN IS NOT UNIFORM WITH THE DECISION OF THE SUPREME COURT IN KOTTEAKOS v. UNITED STATES, 328 U.S. 750, AND THE DECISION OF THIS COURT IN CANELLA v. UNITED STATES, 157 F. 2d 470.**

Throughout the appeal, petitioner has urged that the principles declared in the above cited cases are controlling in so far as petitioner is concerned. If

petitioner was guilty of conspiracy at all, and he denies it, it was not the conspiracy charged in the indictment or the conspiracy for which defendants Carrigan and Calmes were found guilty. If petitioner was party to a conspiracy it began and ended with the arrangement made between Neider and petitioner to assist Davis. If that arrangement was a conspiracy, and the trial court in exonerating Neider impliedly held that it was not, it was certainly not the conspiracy alleged in the indictment.

Petitioner respectfully urges that further consideration will convince the court of the applicability of the two cases above cited.

Wherefore petitioner respectfully submits that affirmation of the judgment of conviction against this petitioner has resulted in a miscarriage of justice, that a hearing should be granted, and that the judgment against petitioner should be reversed.

Dated, San Francisco,
July 30, 1952.

LESLIE C. GILLEN,
CLIFTON HILDEBRAND,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

The undersigned, one of the counsel for the within named appellant and petitioner in the above entitled cause, hereby certifies in his judgment the foregoing petition for a rehearing is well founded, both in law and fact, and that it is not interposed for delay.

Dated, San Francisco,
July 30, 1952.

LESLIE C. GILLEN,
*Counsel for said Appellant
and Petitioner.*

No. 13,118

IN THE
United States Court of Appeals
For the Ninth Circuit

CECIL LEE DAVIDSON, also known as
Jack Reynolds,
vs.

Appellant,

UNITED STATES OF AMERICA,

Appellee.

MOTION TO STAY MANDATE.

*To the Honorable United States Court of Appeals for
the Ninth District:*

The appellant, Cecil Lee Davidson, also known as Jack Reynolds, hereby respectfully moves this Court, in the event that his Petition for a Rehearing is denied, for an order staying the issuance of the mandate in said cause for a period of thirty (30) days after denial of said Petition, in order to allow said appellant to prepare and file a Petition for Writ of Certiorari in the office of the Clerk of the Supreme Court of the United States, and thereafter, until such time as the said Petition for Writ of Certiorari may be

granted or denied and, if granted, until the final determination of the cause.

Dated, San Francisco,
July 30, 1952.

LESLIE C. GILLEN,
CLIFTON HILDEBRAND,
Attorneys for said Appellant.



